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V. 3388

No. 20679

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STEPHAN RIESS and THELMA McKINNEY RIESS,

Appellants,

vs.

C. W. MURCHISON, SIMI VALLEY DEVELOPMENT COMPANY, *et al.*,

Appellees.

APPELLANTS' OPENING BRIEF.

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No. 20679

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APPELLANTS' OPENING BRIEF.

Preliminary.

This is an appeal, pursuant to leave of this court, from an interlocutory order for a stay and requiring the parties to arbitrate, in an action for damages arising from repudiation by purchasers of an agreement to pay for land deeded to them in 1956 pursuant to that agreement. The litigation is now eight years old; it has been tried once, on a former Complaint; it was appealed and reversed. (*Riess v. Murchison,* 329 F. 2d 635 (C.C.A. 9, 1964), No. 18198). It was retried solely on the question of defendants' petition for arbitration, notwithstanding an Amended Complaint based on *repudiation of the contract* by the defendants was filed after the remittitur from the former appeal.

Meanwhile, circumstances have changed, and the defendants have had the benefit of plaintiffs' land, without substantial payment.

All of these things are said by way of preliminary to emphasize the requirements of justice that—so far as possible on this appeal,—all questions be resolved and this court give its direction in order to expedite the final disposition of this litigation.

Jurisdiction.

This is a diversity case. Appellants are citizens and residents of California (Third Amended Complaint, par. I). Defendant Murchison is a resident of Texas; and the defendant Simi Valley Development Company is a corporation organized under the laws of Delaware having its principal office in Texas (Third Amended Complaint, Pars. II and III). Plaintiffs claim damages in the sum of $892,000 plus interest. (*Id.*, Par. XIX.)

Jurisdiction in the United States District Court is based on Title 28, Section 1332.

Jurisdiction in this court is based on Title 28, Sections 1291 and 1292(b). The order of the District Court (which was appealed from) directs the parties to arbitrate and orders a stay of proceedings until the determination is made by the arbitration.

Although there may have been doubt concerning whether the order of the District Court was appealable, that doubt has been resolved by the order of this court specifically granting appellants leave to appeal. (See Order of this court filed *May 11, 1966.*)

Statement of the Case.

This action was commenced in 1958. It is based on two agreements, which in effect constitute a single contract. [Pltf. Exs. A and B; for the convenience of the court there are reprinted in the Appendix hereof both of

the contracts.] By those contracts appellants sold and conveyed certain "water lands", that is to say, lands with water wells on them, which had been tested by the defendants to ascertain the existence of water. The sale was to defendant Murchison, who, with leave of the plaintiffs, assigned the lands to Simi Valley Development Company ("Simi" herein); the latter corporation without, however, releasing Murchison.

Attention is directed to the fact that plaintiffs deeded their land to Murchison in 1956, but that payment, except for some preliminary sums, has not yet been made. [Find. XVII, Former Record, p. 355.][1]

The Complaint on which the case went to trial once before alleged a breach of the contract in the following terms:

> "In connection therewith, plaintiffs further allege that the promise and covenant of defendant C. W. Murchison to build the reservoir and pipe lines was a promise by the said defendant to diligently proceed with the plan whereby said defendant would be extracting water from the land within said two years so that the purchase money provided for in said First and Second Agreements would become due and payable to plaintiffs herein. Plaintiffs further allege that as a result of said defendant's failure to install said pipe lines and construct

[1]The evidence presented on the first trial was before the District Court on the petition for arbitration [Rep. Tr. of March 9, 1965, p. 57]; this court has made its order, filed Feb. 24, 1966, permitting the use of the former record without the necessity for a repetitious duplication. In order to differentiate between the two records and to facilitate reference where there is occasion to deal with the former record, appellants will use the phrase "Former Record"; references to the proceedings following remittitur from the first appeal will be made in the usual form of "Rep. Tr." and "Clk. Tr."

> said reservoir, it has become impossible for plaintiffs to take and receive from defendants the water from the wellhead of any one or more of the wells located on the 'Water Lands' as the plaintiffs herein might prescribe, as provided for in paragraph 2(b) of the First Agreement."

See also the remarks of Judge Westover, who tried the former case. [Rep. Tr. p. 10, lines 11-15.]

On the former trial, the District Court held that the contract was not susceptible of total breach; judgment was rendered for plaintiffs in the sum of $25,000 constituting damages for defendants' delay in building the reservoir and in extending pipe lines, and the failure to pay for water produced, saved, and sold from the water lands up to April 3, 1962. [Former Record, p. 355, Find. of Fact XVII.]

Both sides appealed the former judgment, and the judgment was reversed. This court determined that the question of the sufficiency of water was material to the case (on the Complaint on which the case was tried), that the contract was one susceptible of total breach (but this court made no determination of that fact), and that unless some conduct of the defendants constituted a waiver or estoppel to arbitration the defendants were entitled to have the question of the sufficiency of the water determined by arbitration. (See Opinion of this court on former appeal.)

After remittitur, plaintiffs, on leave of court, filed an Amended Complaint alleging a repudiation by defendants of the contract, that is, an anticipatory breach. [Clk. Tr., Third Amended Complaint, Par. XIII through XXI, commencing p. 2; and see order of court

granting leave to file, Rep. Tr. of Nov. 2, 1964, p. 3, line 21, to p. 4, line 3, and p. 4, lines 19-22.] Paragraphs XIII through XX allege a number of specific breaches, *including the sale by the defendants of the "water lands"* thus rendering it impossible for the defendants to perform the contract; and paragraph XXI summarizes as follows:

> "Plaintiffs allege that by their conduct, as hereinbefore, alleged, the defendants repudiated and breached the agreement, Exhibits "A" and "B", attached to the original complaint, and further allege that because of defendants failure to perform the terms and conditions of said agreements on their part to be performed, and the repudiation and breach of the agreement, plaintiffs have been damaged in the sum of $892,000.00."

This complaint was never denied or otherwise answered, nor did the defendants file any responsive pleading. Instead the defendants filed the petition for a stay of proceedings and for an order requiring the parties to arbitrate.

Plaintiffs filed an affidavit in response to the petition for arbitration in which plaintiffs stated under oath some of the facts constituting defendants' repudiation. [See Declaration of Stephan Riess, at Clk. Tr. p. 37, particularly p. 9, line 13 of the Declaration through p. 10, line 27.] The Declaration states in part:

> "The later part of 1957, R. C. Adams, Jr.,[2] stated to declarant that defendants became involved financially; that defendants would not proceed with the development of the lands; would not

[2]President of defendant Simi.

install the pipe lines, would not make the monthly payments of $2,000.00 per month, that defendants would do nothing unless plaintiffs would give up the 1/6 of the shares of Simi Valley Development Company, agree to an installation of a pipe line only to Simi lands, as full compliance with the terms of the agreements of September 13, 1955, and June 12, 1956, and accept $9,000.00 as full payment for the balance of the $2,000.00 per month payments."

"That defendants were not obligated to drill and complete water wells; to produce and sell water, develop the lands and install the pipe lines, and that plaintiffs would have to wait until such time as water was sold, and then, would be paid at the rate of 10 cents per gallon when sold." [p. 7, lines 17-22.]

"That the renunciation of the agreements by the defendants and *their acts as set out in the third amended complaint* and in this declaration were made with the intent and purpose of avoiding the defendants' obligation and commitments and depriving plaintiffs of their rights and benefits under the agreements of September 13, 1955, and June 12, 1956." [p. 10, line 31, to p. 11, line 4.]

The defendants have not, either by affidavit or testimony, denied any of the quoted statements of Riess' Declaration. (See affidavit of Costin, particularly at page 5 thereof, in part confirming Riess' declaration.)

Hearings were held on defendants' petition and the plaintiffs' controverting declarations. The trial court largely restricted evidence to the issue of waiver of the

right to arbitration by defendants, and estoppel by defendants to claim arbitration.[3]

The plaintiffs' evidence included testimony, undenied by defendants, showing repudiation and abandonment of the contract by the defendants. Nevertheless, the transcript of the hearing leaves the impression that the trial court did not give consideration to the effect of defendants' repudiation of the contract on the defendants' right to arbitrate. The confusion is compounded by the failure of the trial court to make findings. Apparently the District Court was of the opinion that since the defendants had commenced to perform by making payments prior to the first trial, there could not be a total breach of the contract. [*Cf.*, remarks of Judge Westover, p. 559, lines 6-21; and p. 576, lines 17-19.] Plaintiffs' counsel presented the question of repudiation as related to the claim for arbitration at page 560, lines 13-18, as follows:

> "MR. SCHWARTZ: No, your Honor. It couldn't be determined by the arbitrators except for the fact, as pointed out previously, and as I point out again, whether they are entitled to arbitration will depend upon the conduct of the defendants and whether they waived it, whether they repudiated the contract."

Notwithstanding this statement, and others in plaintiffs' Memorandum of Authorities on the question of defendants' loss of the right to seek arbitration by reason of defendants' repudiation [Clk. Tr. commencing

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[3]"The Court: He [defendant Murchison] is entitled to arbitration unless it has been waived" [Rep. Tr. p. 558] ". . . or he has been estopped." [Rep. Tr. p. 559, lines 1-3.]

at p. 152, particularly p. 23 of the Memorandum; see also Rep. Tr. p. 616, line 24, to p. 617, line 4], it appears probable that the District Court did not consider anything other than the question of an express waiver and estoppel, notwithstanding there was undenied evidence of defendants' repudiation.

Appellants contend there was substantial, undenied evidence of repudiation by the defendants (which will be summarized hereinafter under an appropriate heading in this brief) and that such repudiation deprived the defendants of the right to arbitrate.

Specification of Errors.

1. The District Court erred in failing to limit the arbitration provisions to determining the sufficiency of the water as a prerequisite for defendants' obligation to build a reservoir and to extend pipe lines.

2. The trial court erred in failing to determine the issue of defendants' alleged repudiation before hearing and ordering arbitration.

3. The District Court erred in failing to determine, on the record made, that defendants had repudiated their obligations under the contract.

4. The District Court erred in failing to determine that defendants had abandoned the contract.

5. The District Court erred in ordering arbitration.

6. The District Court erred in failing to make Findings of Fact in support of its order staying proceedings.

7. The District Court erred in determining that defendants were not in default.

Appellants' Contentions.

1. (a) The clause providing for arbitration [par. (f) of the 1956 agreement, Ex. B, referring to par. 3 of the 1955 agreement, Ex. A] is limited in its application to a claimed breach by reason of the failure of the defendants to extend water lines and build a reservoir. The trial court erred in holding that arbitration was applicable to the claimed repudiation of the contract.

(b) If there was any doubt concerning the application of the arbitration clause, the trial court erred in failing to consider and to determine the meaning.

2. The defendants repudiated the contract; this repudiation deprived the defendants of the benefits of the contract, and in particular, deprived the defendants of the right to demand arbitration; the trial court erred in ordering arbitration.

3. The record made below shows that defendants repudiated their obligations under the contract and were therefore, not entitled to arbitration.

4. The order appealed from stayed all proceedings and thus constituted an injunction; the trial court erred in failing to make findings of fact.

5. In any event, the order is erroneous in determining that defendants were not in default; such a conclusion predetermines the consequences of the arbitration because if it be the law of the case that defendants are not in default, there is no need to arbitrate the question of the sufficiency of the water. The issue of defendants' default was not considered; if the error is not corrected, the order will improperly prejudice the plaintiffs in subsequent proceedings in this case.

ARGUMENT.

I.

A. The Arbitration Clause [Paragraph (f) of the 1956 Agreement, Exhibit B] Is Limited to Defendants' Obligation to Install Reservoirs and to Extend Pipe Lines; the Trial Court Erred in Failing so to Limit the Clause.

The Third Amended Complaint which was before the court at the time of filing of the petition for stay and arbitration was based on defendants' repudiation of the contract. It is well established, and will be presented under a separate heading, that one who repudiates a contract cannot have any further benefits of the contract. Under the present heading appellants urge that the arbitration provisions of the contract relate only to defendants' obligation to construct a reservoir and pipe lines.

The arbitration provisions are contained in the 1956 agreement.

> "(f) If any disagreement shall arise between us relative to the physical ability of the wells on the water lands to produce sufficient quantities of water to service the Montgomery lands and the additional lands, *as contemplated in Paragraph 3 of the Letter Agreement,* that issue shall be submitted to three (3) arbitrators, one of which shall be selected by you, one by me and the third by the other two arbitrators, and whose decision shall be final." (Italics added.)

Paragraph 3 of the agreement of 1955 reads as follows:

> "Subject to the physical ability of the well or wells now or hereafter located on the Water Lands

> to produce sufficient quantities of water so as adequately to service the lands covered by the Montgomery Contract with an adequate supply of water, contemplating that such lands will be developed for residential and industrial usages, I agree within two years from the date of the consummation of the purchase of the lands herein provided to be purchased by me from you, to install or construct or to cause to be installed or constructed a reservoir and pipe lines to transmit water produced from the Water Lands at least to the nearest boundaries of each of the three tracts of land covered by the Montgomery Contract." (And see Statement of Facts in Opinion of this Court on former appeal.)

The words italicized in paragraph (f) would be of no significance if arbitration were contemplated in the event of *any* question concerning the sufficiency of water. The italicized words have a function if arbitration is applicable only as a prerequisite to the provisions of Paragraph 3 of the 1955 agreement, that is, to defendants' obligation to extend pipe lines and to build reservoirs.

The situation is governed by portions of California Civil Code §1641, which says: "The whole of a contract is to be taken together so as to give effect to every part, if reasonably practicable. . . ."

In *Lawrence Block Co. v. Palston,* 123 Cal. App. 2d 300, at page 310, the court said:

> "A contract shall be so construed as to give force and effect, not only to every clause, but to every word in it, so that no clause or word may become redundant."

To the same effect are also:

Harris v. Klure, 205 Cal. App. 2d 574, 578 (1962).

Pico Citizens Bank v. Tafco, Inc., 165 Cal. App. 2d 739, where the court said, at page 746:

> "As said in *Hyatt v. Allen,* 54 Cal. 353, 358, quoted with approval in *Wagner v. Shapona* (1954), 123 Cal. App. 2d 451, 461 [267 P. 2d 378]:
>
> '. . . it is our duty to so construe every provision of a written instrument as to give force and effect, not only to every clause but to every word in it, so that no clause or word may become redundant, unless such construction would be obviously repugnant to the intention of the framers of the instrument, to be collected from its terms, or would lead to some other inconvenience or absurdity.' "

Further to illustrate appellants' contention in this respect there is quoted below the relevant portions of paragraph (f) of the 1956 agreement *omitting* the limiting reference to paragraph 3 of the 1955 agreement:

> "(f) If any disagreement shall arise between us relative to the physical ability of the wells on the water lands to produce sufficient quantities of water to service the Montgomery lands and the additional lands, . . . that issue shall be submitted to three (3) arbitrators, one of which shall be selected by you, one by me and the third by the other two arbitrators, and whose decision shall be final."

If the limiting clause were not contained in the contract, arbitration could be required in case there were any disagreement concerning sufficiency of the water; and the

meaning of paragraph (f) would be completely changed. [See remarks of Judge Westover, Rep. Tr. Vol. 3, p. 353, lines 7-9.]

The attention of this court is respectfully directed to paragraph 2 of the 1955 agreement. [Pltf. Ex. A.] Subparagraph (a) of paragraph 2 is not subject to arbitration. Furthermore, subparagraph (b) of the same paragraph is not subject to arbitration; indeed paragraph 4 provides for giving security to fulfill defendants' obligations under paragraph 2(b). Neither are paragraphs 5, 6, 7, 8, 9, 10, 11 and 12 made subject to arbitration. Paragraph 3 of the 1955 agreement is obviously different from the remaining obligations of the defendants. The obligations of the defendants under that paragraph are "*Subject to . . .*"; and paragraph (f) of the 1956 agreement refers to paragraph 3 of the 1955 agreement and provides for arbitration.

Appellants urge that respondents' obligations under all of the paragraphs of the 1955 agreement were not subject to arbitration, but only a claim of sufficiency of water as a prerequisite to the defendants' obligation to build reservoirs and pipe lines under paragraph (3) of the 1955 agreement.

Defendant Murchison's right to reconvey the lands and thus be relieved of further obligation is not subject to arbitration; indeed the opposite is provided for, because paragraph (h) of the 1956 agreement provides that Murchison may reconvey the lands "if in my [Murchison's] opinion" the wells are no longer capable of producing sufficient water. Such a right, based on one party's opinion as to the productivity of the wells, is patently inconsistent with the requirement for arbitration whenever such a difference is claimed to exist. [See

admission of defendants' counsel, Rep. Tr. Vol. 4, p. 440, line 20, to p. 441, line 2.]

This branch of the argument may become irrelevant if this court agrees that on a complaint based on repudiation of a contract, the issue of repudiation must be determined before a party can have arbitration; if the defendants have repudiated plaintiffs, as alleged and, as appellants urge, has been proved, the defendants cannot have arbitration. The reason is that, following a repudiation by the defendants, the contract has validity only to measure damages. It does not exist as an agreement under which to submit an issue to arbitration.

But the point may become relevant if the trial court should determine there were breaches by the defendants (other than a breach under paragraph 3), but not a repudiation. The trial court should then have the benefit of this court's direction with respect to the defendants' right to arbitration. Appellants urge that arbitration is limited to determining the adequacy of the water as a prerequisite to the existence of defendants' obligations under paragraph 3 (the duty to build a reservoir and to extend pipe lines) and not otherwise. In any event, arbitration cannot decide whether there has been a repudiation, because this question goes to the *effective* life of the contract.

6 Williston on Contracts (1920, Rev. Ed.), page 5369;

Friedlander v. Stanley Productions, 24 Cal. App. 2d 677;

Stetson v. Orland Oil Synd. (1940), 42 Cal. App. 2d 139;

Hanes v. Coffee (1931), 212 Cal. 777.

The court erred in ordering arbitration in the face of proof of repudiation or at the very least in ordering arbitration before determining the issue of repudiation.

B. If There Were Any Doubt Concerning the Meaning and the Application of the Arbitration Provision, the Court Should Have Taken Evidence to Resolve the Doubt.

In approaching this question of construing the contract appellants wish to point out:

(i) If the contract was repudiated by defendant, there was no need for construction of this contract, because defendants could not have the benefits of the contract, specifically, defendants could not require arbitration.

(ii) If the contract survives, that is, if this court finds that defendants have not repudiated the contract, and if notwithstanding the apparent clarity of the language there is doubt concerning the meaning of the provisions relating to arbitration, the trial court should have resolved that doubt by taking extrinsic evidence.

Appellants do not contend that the agreement was ambiguous. The defendants make the present argument out of an excess of caution, in the event this court should decide that the agreement is unclear concerning arbitration. If this court should so determine, it should also conclude that it was the duty of the District Court to have received evidence and to have made a determination concerning the application of the arbitration provisions in order to resolve that doubt.

In *Shipley v. Pittsburgh & L.E.R. Co.* (U.S.D.C., W.D. Pa., 1949), 83 Fed. Supp. 722 at 741, the court said:

> "A situation exists where the contracts are capable of being understood in more senses than one; they are obscure in meaning, through indefiniteness of expression. Since the contracts are ambiguous, that is, the language used is reasonably susceptible of more than one meaning, *it is the duty of the court* to determine the intent of the parties." (Italics ours.)

Likewise in *Petro v. Ohio Casualty Co.* (U.S.D.C., S.D. Cal., 1950), 95 Fed. Supp. 59 at page 61, the court said:

> "When, of course, a contract is uncertain and ambiguous it becomes *the duty of the court* to determine, if possible, what is intended, but in the absence of such ambiguity and uncertainty, and when the contract is in all respects valid, the power of the court is limited to enforcing such contract according to its terms." (Italics ours.)

The point appears obvious. Nevertheless there is no indication in the proceedings below that the court applied this rule. Apparently the District Court thought itself bound by the decision of this court rendered on a complaint for breach of defendants' obligation to build a reservoir, even though a new complaint pleading repudiation had been filed after remittitur following the former appeal. It is respectfully urged that the District Court erred in directing arbitration.

II.

A. Respondents Repudiated Their Contract With Appellants, and Thus Lost the Right to Require Arbitration.

The Complaint which the court at the time of the petition for stay and requiring arbitration was filed after leave of court on November 2, 1964. That Complaint alleged that the defendants had repudiated their contract. [Third Amended Complaint, Clk. Tr. commencing at p. 2, at pp. 14, 15 and 17, summarized in paragraph XXI of said Complaint.] Defendants have never filed a denial, an Answer, or other responsive pleading to that complaint. Instead, defendants filed a petition for stay of proceedings and arbitration. [Clk. Tr. p. 22 *et seq.*]

Appellant's affidavit opposing the motion, contains the following statements:

> "Declarant alleges that at a meeting, in early 1958, at which were present the plaintiffs: Glen Costin, then president of Simi Valley Development Company, Francis C. Cobb, then attorney for plaintiffs, and H. F. Rosemund. Mr. Cobb and Mr. Costin said that, unless plaintiffs:
>
> a) Delivered to defendants their one-sixth of the shares of stock of the Simi Valley Development Company;
>
> b) That plaintiffs accept one-half of the defaulted payments in satisfaction of that obligation;
>
> c) That plaintiff accept construction of a pipeline to the Smith land as compliance with construction obligations of the contract;

d) That if plaintiffs did not accept the proposal, defendants would not make the balance of payments; would not commence construction of the reservoir and pipelines by June 12, 1958; would never construct the pipelines and reservoir;

e) That plaintiffs would have to go to court and defendants would keep them litigating for ten years until plaintiffs could no longer afford to fight and plaintiffs would have nothing left.

f) That defendants can sit and wait until metropolitan water comes in, perhaps in three years, and that plaintiffs would be frozen out and get nothing.

g) That unless plaintiffs agreed defendants would make tests of the wells in such a way as to show insufficiency, and then claim their performance was executed.

That plaintiffs thereupon requested that the water lands be returned to them. That defendants refused.

"Declarant further states that early in April 1958, defendants removed the 360 horse-power Cummins engine from Well No. 2, and removed the 14" pump bowls. That a transformer was installed by defendants to furnish power to the motor on Well No. 2. That the transformer capacity was insufficient for a motor or more than 150 horsepower. That 8" pump bowls were installed and a 150 horse-power motor. That the productive capacity of Well No. 2 was greatly reduced because of lack of power and pump capacity.

"Declarant alleges: That defendants repudiated and breached the agreements of September 13, 1955 and June 12, 1956. That by their acts and conduct, defendants prevented and made it impossible to perform test of the wells. That the acts of defendants were inconsistent with the agreement to submit the controversy to arbitration and constituted a breach of the agreements and right to arbitration.

"That by their conduct, the defendants so changed the condition of the wells as to make testing impossible, unfair and inequitable. That the defendants are not in court with clean hands.

"That the renunciation of the agreements by the defendants and *their acts as set out in the third amended complaint* and in this declaration were made with the intent and purpose of avoiding the defendants' obligation and commitments and depriving plaintiffs of their rights and benefits under the agreements of September 13, 1955, and June 12, 1956."

"That defendants were not obligated to drill and complete water wells; to produce and sell water, develop the lands and install the pipe lines, and that plaintiffs would have to wait until such time as water was sold, and then, would be paid at the rate of 10 cents per gallon when sold."

. . .

"That the renunciation of the agreements by the defendants and their acts as set out in the third amended complaint and in this declaration were made with the intent and purpose of avoiding the defendants' obligation and commitments and de-

priving plaintiffs of their rights and benefits under the agreements of September 13, 1955, and June 12, 1956." [Clk. Tr. p. 37, to p. 39, line 13.]

In reply to plaintiff's Declaration, the defendants filed the Declaration of John C. Willard, an affidavit of Sherman Royce, and an affidavit of Glen Costin. The Declaration and affidavit of Willard and Royce consist for the most part of opinions concerning the productivity in water of the "water lands". The Declaration of Costin is largely consistent with the Declaration of plaintiff Stephan Riess. Costin says that $108,000 has been paid to Riess, and that various other sums were paid with respect to drilling wells and obtaining reports concerning the amount of water available. Costin further says that on April 13, 1957, Simi entered into an agreement of sale with Subdivision Finance Corporation whereby the latter was to purchase all of the "fee property" owned by Simi, and was to perform all of Simi's and Murchison's obligations; but that Subdivision Finance Corporation defaulted. Costin goes on to say: "That by reason of the assurances and contracts of commitment by Subdivision Finance Corporation to perform, Simi Valley Development Co. delayed the commencement of testing said wells and engineering the pipe lines until the default by Subdivision Finance Corporation." [Affidavit of Costin, p. 5.]

Costin's affidavit further goes on the make "Reply to Specific Paragraphs of Declaration of Stephan Riess". In this branch of Costin's affidavit, Costin says that a request was made of Riess that he postpone the requirements of the commencement of the pipe lines until a master plan had been completed. He further says that it was Simi and not Murchison who removed

the pumping unit that was attached to a Diesel engine because engineers advised that the Diesel engine inadequate. Other statements in Costin's affidavit reiterate the defendants' contention that the water which could be produced from the water lands would be inadequate for the development of the entire 1600 acres of Montgomery lands.

But nowhere in Costin's affidavit is there a denial of the statements made in Riess' affidavit concerning the abandonment of the wells, the capping of the wells by the defendant, and the repudiation of the contract. On the contrary, Costin's affidavit says in substance that Simi had determined that the water supply was inadequate for the development of the entire 1600 acres and that Simi accordingly was under no obligation to perform any other portion of the agreement. Thus, Costin's affidavit is in effect the same kind of affidavit as was filed by the defendant in *Bertero v. Superior Court,* 216 Cal. App. 2d 213 (1963), which was cited by this court in its opinion on the earlier appeal, and which the District Court of Appeal of the State of California held was a repudiation of the contract.

The District Court apparently concluded it would not determine the issue respecting arbitration solely on the basis of affidavits but would take testimony. [Rep. Tr. p. 32, lines 3-7 (Dec. 14, 1964).] Thereupon defendants put on testimony to the following effect: an expert, knowing the county requirements for minimum amounts of water, could examine the land which was to be served with the water, and then examine the records of the drillings that had been made on the water lands in prior years (and possibly by drilling additional wells), could determine whether the water lands could produce sufficient water to serve the lands.

Plaintiffs put on evidence of repudiation substantially similar to that in their affidavit:

"Mr. Adams[4] said, 'I don't think so. Mr. Murchison is out of this now. We are selling. We have all the water we want. We are going to shut down as of today.'

THE COURT: Did he explain in any way what he meant by 'We have all the water we want'?

THE WITNESS: He said, 'We got all the water we need here.'

I said, 'Put the pumps in all the wells and let's have it.'

He says, 'We don't need more than No. 2. We are satisfied. We don't want to drill any longer. The rigs go out. I have no money. Murchison closed the check book.'" [Rep. Tr. Vol. 2, p. 275.]

"A. At that time I[5] was bluntly told that unless I would take half of the money due that Murchison agreed to pay, who was out of this now, I would get myself litigated, a belly full of litigation, until I am broke and it would last 10 years and I will never get anywhere.

Q. Was there anything said at that time about your shares in Simi Valley Development Company? A. Yes.

Q. Were any terms told you as to what you would have to do? A. Yes.

Q. Will you state what was said? A. I was told that I got to throw in my one-sixth interest in the lands which I held by reason of the shares,

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[4]President of defendant Simi Valley Development Co.

[5]Plaintiff Stephan Riess.

for nothing, that I got to be satisfied with half of the money that is called for under the agreement, and that I must agree that the pipelines shall only be put on the Smith property instead of on the Montgomery parcel, or else they will stop me dead cold, I cannot use my own water, I won't have a way out with it." [Rep. Tr. Vol. 3, pp. 311-312.]

"Q. Mr. Riess, did you have any other conversations at other times with the agents or representatives of the defendants involving threats? A. I did.

Q. Can you tell us the time the conversation took place, when? A. That was in my house in 1957, in the latter part of the year. I had steam heat on at home. That is why I know it was later in the year. Mr. Cobb and Mr. Costin came back again to discuss this problem of giving them my one-sixth interest and making a new deal.

Q. Just a moment. The answer was 'yes'? A. Yes.

Q. All right. You said it was in your house? A. Yes, right in Santa Barbara.

Q. In Santa Barbara. Now, who was present? A. Mr. Cobb, Mrs. Riess, and myself, and Mr. Costin.

Q. And what threat was made at that time? A. At that time I was told that this is their last offer they would give me, if I don't accept that, 'Go ahead and sue. We will take care of you.' That's the whole story.

Q. Was that all the conversation? A. Just about all of it. There was agreement that I

wouldn't. They[6] told my wife, 'Now, Mrs. Riess, your husband ought to have a little bit more sense. He is just going to get broke, lose everything he has, and you will lose your beautiful home here.' " [Rep. Tr. Vol. 3, pp. 313-314.]

"A. I said to Mr. Costin,[7] 'What are you now going to do? Am I going to get water down the canyon and get some money for my water.'

Then he said, 'You are not going to get any money, you had it, unless you are going to turn over your sixth to us. Then we will sit down and talk business.' " [Rep. Tr. Vol. 4, p. 472.]

"A. We[8] were told that the first thing, the first demand that I must meet before they get any further is to turn over my one-sixth; that otherwise they will not proceed, they won't put pumps in the wells, they won't put the power on, and I simply will get nowhere." [Rep. Tr. Vol. 4, p. 474.]

"Q. What, if anything, did Mr. Costin[9] say about delivering water to you? A. He wouldn't give me any. He said—

Q. Mr. Riess, we are not asking you for a conclusion. A. He said, 'No, I won't give you any'—

Q. Just a minute. What did he say to you?" [Rep. Tr. Vol. 4, p. 476.]

"A. He[10] said, 'You will never get any. You can get your wells back when Metropolitan is in,'

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[6]Attorney and officer of defendant Simi Valley Development Co.

[7]Officer of defendant Simi Valley Development Co.

[8]Plaintiffs Stephan and Thelma McKinney Riess.

[9]Officer of defendant Simi Valley Development Co.

[10]Mr. Costin, President of defendant Simi Valley Development Co.

he said. 'Let the public then find its own water. We are not interested in it.'" [Rep. Tr. Vol. 4, p. 477.]

"THE WITNESS: At that time again he[11] told me that I will never get any water." [Rep. Tr. Vol. 4, p. 478.]

"Q. And what if anything did he[12] say about putting a pump on No. 0 or No. 1 well? A. Just refused.

Q. What? A. He just refused.

Q. You say he refused. What did he say? A. He said, 'Never.' He said, 'Never.'" [Rep. Tr. Vol. 4, p. 480.]

"THE WITNESS:[13] Yes. Francis Cobb[14] told me that if I ever want to get any money or water or money for water I have to rewrite an agreement with Simi Valley Development Company because Murchison is out of it anyhow, that I must agree to sell water to them, take all my wells back, and give them a priority call on 750 gallons a minute, that he came to me to try to get this thing out of the way as a neighbor, rather, which he was up there.

Q. Is that all that was said at that time? A. He said, 'This man will never agree to go on in Dallas, they will hire men and expert you out of business. They will prove that you haven't got the water. What can you do?'

Q. Was there anything said in that conversation about putting any of the wells back in produc-

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[11]Mr. Costin, President of Simi Valley Development Co.

[12]Mr. Costin, President of Simi Valley Development Co.

[13]Stephan Riess.

[14]Attorney for defendant Simi Valley Development Co.

tion? A. He said, 'They never will. You better take everything back and sell us water.'

Q. And was anything said in that conversation about your having to give up your one-sixth of the shares? A. That was conditional, of course, every time.

Q. Just answer the question. A. Yes, it was.

Q. And what was said? A. It was said that unless I first give up my one-sixth, there will be no discussion possible." [Rep. Tr. Vol. 4, pp. 495-496.]

This court, on the former appeal, stated:

"Subsequently, during certain meetings between the sellers and the buyers, and in certain correspondence and conversations between them, concerning future performance by the buyers under the contract, the buyers expressed some unwillingness to comply exactly with the terms of the contract. Whether the buyers actually repudiated the contract is in dispute.

". . .

"The buyers have not paid the sellers at the contract rate for water produced, saved, and sold by them from the water lands, though between the consummation date and the date of trial they did produce, save, and sell water therefrom.

"The buyers have never exercised their right under the contract to terminate the contract for insufficiency of the water on the water lands."

". . .

"The District Court then proceeded to make findings of fact and conclusions of law. It held

> that the buyers committed partial breaches of the contract: the court held that the buyers breached by paying only $30,000, instead of $48,000, during the two years immediately following the consummation date; in this connection, it held that the voluntary payments of $28,000 made prior to the consummation date should be credited against monies to become due under the contract after trial, not against the $48,000 due during such first two years. . . . The court further held that the buyers breached by failing to pay the sellers at the contract rate for water produced, saved, and sold by them from the water lands." (329 F. 2d 635, 638-639.)

In view of the fact that all of the proceedings of the earlier hearing before the District Court were ordered to be before the District Court on the Petition for Arbitration [Rep. Tr. p. 57], it is well to state that in addition to the partial breaches previously found by the District Court and affirmed by the Circuit Court of Appeal, the defendants insisted upon a return of the one-sixth interest in Simi [Rep. Tr. Vol. 4, pp. 472, *et seq.*], the bringing in of metropolitan water in 1963 and 1964 [Rep. Tr. Vol. 1, p. 141], the abandonment of the wells since approximately 1964 [Rep. Tr. Vol. 1, p. 118], the fact that defendants pulled out the pumping equipment [Rep. Tr. Vol. 2, pp. 208-234, 242, 252, 272, 275], and the unequivocal statements of the agents that they did not need the wells, that defendant Murchison was out of the matter now, that the defendants were selling, that they had all the water they wanted, and were going to shut down immediately, that defendant Murchison "closed the checkbook" [Rep. Tr. Vol. 4, pp. 495-496], the statement of defendants' counsel Cobb,

that the agreement must be rewritten if the plaintiffs were to get any water — all of these facts show the clear intention of the defendants not to resume performance unless and until the plaintiffs return their one-sixth interest in Simi and accepted only one-half of the $18,000 due from monthly instalments unpaid.

To be effective, an offer must be free of conditions which the offeree is not bound to perform. (California Civil Code, §1494); and see *K. & M. Inc. v. LeCuyer* (1951), 107 Cal. App. 2d 710, 717.) The various offers made by defendant Simi were either for less than was due or were made conditioned on plaintiffs' giving up their shares of stock in that corporation. Such offers do not, of course, constitute adequate tenders of performance. In fact, defendants stated they intended not to perform.

In view of defendants' repudiation, plaintiffs were relieved of making further requests for payment in water.

> ". . . Where failure of a party to perform a condition or a promise is induced by a manifestation to him by the other party that he cannot or will not substantially perform his own promise — the duty of such other party becomes independent of the performance of the condition . . .". (Am. Law Inst., Restatement of Contracts, §306, quoted in *Grivas v. Alianza Compania Armadora S.A.* (C.C.A. 2, 1960), 276 F. 2d 822, at p. 828.)

See also, California Civil Code, §1440; *Tatum v. Levi* (1931), 117 Cal. App. 83 at page 89; *Heulen v. Stuart* (1923), 191 Cal. 562 at page 569; *Walker v. Harbor*

Business Blocks (1919), 181 Cal. 773 at page 778; *Placid Oil Co. v. Humphrey* (D.C. Tex., 1956), aff'd 244 F. 2d 184.

It must be remembered that since the commencement of this lawsuit and while defendants were in default, there has occurred a critical change of condition. The relevant lands, which were intended to have been served by the water from the plaintiffs' water lands, were in December 1963 connected with water from the Los Angeles Metropolitan Water District, and water was actually pumped to these lands in January, 1964. [Rep. Tr. Vol. 4, p. 461, lines 16-20; p. 501, lines 3-4.] The provisions of the contract for the payment of the purchase price by delivery of water have accordingly been rendered substantially valueless by defendants' breaches and delays. The undenied testimony by plaintiffs is that the defendants knew what they were doing by the delay, and continued to delay because of the oppressive character of requiring the plaintiffs to wait.

However, because defendants have repudiated the contract, they cannot now benefit from its terms defining the means of payment; if this court finds repudiation, defendants must pay in money damages. At this point we deal with the effect of repudiation with defendants request for arbitration.

It should first be observed that the evidence above quoted has not been denied; that evidence stands uncontradicted, the defendants having allowed the matter to be submitted for decision without undertaking to

meet the evidence of repudiation. On this record, appellants urge that the defendants are bound by the testimony showing the defendants' repudiation.

The law is clear that a party to a contract who repudiates it, cannot claim the benefit of a provision of the contract allowing arbitration.

In *Grunwald-Marx, Inc. v. Los Angeles Joint Board, et al.,* 192 Cal. App. 2d 268 at p. 278, the court said:

> " 'Suppose first that he repudiates the agreement to arbitrate itself. By such a repudiation he does not deprive the other party of his right to arbitration; and if the repudiator brings an action in breach of his valid arbitration agreement the defendant can defend on the ground that arbitration is a condition precedent, or under a statute can obtain a stay or an order to arbitrate, or can counterclaim for damages. But such a repudiator has himself no right to arbitration. The other party can now bring his action in reliance on the repudiation, or otherwise change his position in reliance. Thereafter, the repudiator has no power of retraction and cannot insist on the remedy by arbitration . . .' "

4 Corbin on Contracts, Section 970 (1951):

> "If the time for the defendant's promised performance was not definitely fixed in the contract, but the defendant promised to perform whenever requested by the plaintiff, or as soon as the plaintiff should have performed certain conditions precedent, their repudiation by the defendant is regarded by all courts without exception as a breach of the contract, creating an immediate right of action. Inasmuch as the conditions precedent to

the defendant's duly of immediate performance had not been performed at the time of the repudiation, it seems clear that their repudiation was an anticipatory one, and that it no more constituted a non-performance of the declarant's promise than does a repudiation antecedent to a definitely specified date for the performance. All agree however, that the defendant's repudiation excuses the plaintiff from performing conditions precedent; and therefore, it is said that the defendant's performance becomes instantly due, and that there is a breach by non-performance in addition to the defendant's repudiation."

4 Corbin on Contracts, Section 954 (1951), states:

"How were the rights of the parties affected and what is the character of the breach when a failure to render some performance when due is accompanied by a repudiation of the contractual obligations? In the first place, such repudiation is called an 'anticipatory breach' when it occurs before any performance by the repudiator is actually due . . . Suppose next that the contract requires performance in installments or continues for some period in that there has been such a partial failure of performance as justifies immediate action for partial breach. If this partial breach is accompanied by repudiation of the contractual obligation such repudiation is anticipatory with respect to the performances that are not yet due. In most cases, the repudiator is now regarded as having committed a 'total' breach, justifying immediate action for the remedies appropriate thereto."

17A Corpus Juris Secundum, Contracts, Section 472(1), page 652, says:

> "On renunciation or repudiation of an executory contract by one party, the other party, under most authorities, may rescind the contract, or treat it as binding until a time for performance arrives, or sue *immediately* for the anticipatory breach."

In this case, the actual partial breaches, are: (1) failure to pay $18,000 for nine monthly installments; (2) failure to pay for water pumped, sold, and delivered; (3) destroying the wells; (4) selling the water lands [Third Amended Complaint, par. XX, incorporated in Riess' Declaration, p. 10, lines 31 *et seq.*] These breaches were coupled with a repudiation of the contract by words and acts. The actual breaches coupled with the anticipatory repudiation equals a total breach and therefore deprives the defendants of the right to require arbitration.

6A Corbin on Contracts, Section 1443 (1962), states:

> "Although one party cannot by himself 'rescind' a contract, he can wrongfully 'repudiate' it . . . Suppose first he repudiates the agreement to arbitrate itself. By such a repudiation, he does not deprive the other party of his right to arbitration . . . But such a repudiator has himself no right to arbitration. . . ."

Caughlin v. Blair (1953), 41 Cal. 2d 587, appears close to the case at bar. In the cited case plaintiffs bought a lot from defendants for the stated purpose of building a residence on it. Defendants agreed to pave the street in order to provide access to the lot, and to install gas and electric lines to the property within a

year from the agreement. On the date performance was due, defendants had neither installed gas or electric lines nor paved the road. Plaintiffs requested performance, and then filed suit for total breach of the contract. At some time in the year after performance was due, defendants installed a fraction of the road, but did not put in the electric and gas lines; however, after suit was filed, some part of the lines were put in. In affirming a portion of the judgment for plaintiffs, the court said:

> "The distinction defendants would draw between a permanent and a temporary injury has no relevance in a case involving a total breach of contract. In an action for damages for such a breach, the plaintiff in that one action recovers all his damages, past and prospective." (*Id.*, p. 598.)
>
> . . .
>
> "At that time performance was one year overdue. By seeking damages for the difference in the value of their property with and without performance, plaintiffs gave notice that they would no longer treat defendants' continued failure to perform as a partial breach. Defendants could not reasonably expect plaintiffs to continue indefinitely to treat the breach as partial. Even if a breach might be considered partial at the time performance is due, there is a limit to the time a promisee must thereafter await performance. The trial court could reasonably conclude that that limit was reached here." (at p. 599.)
>
> . . .
>
> "Despite repeated requests by plaintiffs, defendants had not installed the improvements called for

> by the contract. It was uncertain when if ever they would do so. Although defendants had not expressly repudiated the contract, their conduct clearly justified plaintiffs' belief that performance was either unlikely or would be forthcoming only when it suited defendants' convenience. Plaintiffs were not required to endure that uncertainty or to await that convenience and were therefore justified in treating defendants' nonperformance as a total breach of the contract." (pp. 599-600.)

See also: *Bertero v. Superior Court* (1963), 216 Cal. App. 2d 213; *Local 659 v. Color Corporation* (1956), 47 Cal. 2d at page 189; Corbin on Contracts, Sec. 1443.

And see: *American Type, etc. Co. v. Packer* (1900), 130 Cal. 459, 463, 62 Pac. 744; *Clarke Contracting Co. v. City of New York,* 229 N.Y. 413, 419-420, 128 N.E. 241; *Helger Corp. v. Warner's Features,* 222 N.Y. 449, 453-454, 119 N.E. 113; *Gold Mining and Water Co. v. Swinerton* (1943), 23 Cal. 2d 19, 142 P. 2d 22; Corbin on Contracts, Section 946.

Appellants accordingly urge that the District Court erred:

(a) In failing to determine the issue of repudiation before hearing and ordering the arbitration;

(b) In the hearing for arbitration, in failing to consider the effect of repudiation; and

(c) In failing to determine, on the record below, that defendants had repudiated the contract.

B. The Defendants Failed and Refused to Develop the Water Lands, Abandoned Drilling Operations, and Thus Frustrated the Purpose of the Contract and Abandoned the Contract; by This Conduct Defendants Deprived Themselves of the Right to Require Arbitration.

The agreed contract price for the water lands was $1,000,000. Of this amount defendants have paid $108,000 ($50,000 in 1956 and $2,000 per month for fourteen months; see Affidavit of Costin). As to the remainder, defendant Murchison (and his assignee) had an election either to pay in water derived from the water lands or in cash. [Ex. A, Par. 2(b), the 1955 agreement.] The agreement contemplated the development of the Montgomery lands and other lands and also contemplated that these lands would be supplied with water from the water lands. Following are excerpts from Exhibit A (the 1955 agreement) which are pertinent here:

> "This letter agreement shall serve to evidence and confirm the basic general understandings and agreements entered into between us this date relative to the acquisition by me, or my nominees, designees or assignees (and it is understood that throughout this letter all references to me shall include my nominees, designees and assignees, if any), of certain lands now owned by you and your wife and the water rights pertaining thereto and the water wells situated thereon and the participation by you and your wife and Len Acton and Guy L. Mann, collectively, in the proportion of one-half by you and your wife and one-half by Messrs. Acton and Mann, in (a) the *lands or the income*

and profits therefrom located in Ventura County, California which I have contracted, by contract dated August 26, 1955, to purchase from one M. Laurence Montgomery and (b) certain other lands which I might hereafter acquire in the area known as the Semi [*sic*] Valley of California." (Italics ours.)

"Our basic agreements and understandings are in general as follows:

1. You have represented and hereby do represent that you and your wife own good and merchantable title to certain lands in Ventura County, California, comprising [*sic*] approximately 300 lots plus approximately three and one-half acres upon a portion of which there is presently located one or more wells capable of producing many millions of gallons of commercially pure water (the portion of which lands upon which such well or wells are located are hereinafter referred to as the 'Water Lands'). . . . With respect to such expected lands you shall also assign and convey to us all water rights appurtenant to same. . . .

2. In consideration for such lands and water rights I agree to:

(a) Grant unto you, your wife, Len Acton and Guy L. Mann, collectively, but in the proportions of one-half to you and your wife and one-half to Messrs. Acton and Mann, a one-third participation in the lands of the net profits therefrom covered by the aforesaid contract between myself and M. Laurence Montgomery (hereinafter called the 'Montgomery Lands') together with a like interest or participation in such other lands as I might

hereafter acquired within the said Semi [*sic*] Valley as may be serviced by water from wells now or hereafter located upon the Water Lands. This interest or participation in such lands shall be either in the character of an undivided one-third title to the fee thereof or the right to receive one-third of the net profits to be derived from the operation, development and/or sale thereof or an interest in a limited partnership which would own such lands. . . . In any event, however, it is agreed that regardless of the nature or character of the interest and participation of yourself, your wife and Messrs. Acton and Mann in said lands or in the net profits therefrom, *I shall have full discretionary rights of management, control and disposition of such lands* regardless of the character of yours, your wife's and Messrs. Acton's and Mann's said rights and interests therein." (Italics ours.)

The last quoted portion (Par. 2(a)) was deleted by the 1956 agreement, which substituted the following provision of Exhibit B:

"(d) Paragraph 2(a) of the aforesaid Letter Agreement shall be stricken in its entirety and all other provisions of the Letter Agreement relating to the interests or undivided profit rights of yourself and Mrs. Riess and Messrs. Len Acton and Guy Mann in the Montgomery lands and in other lands to be acquired by me in the area shall be eliminated and you and Mrs. Riess and Mr. Acton and Mr. Mann shall surrender all of such rights and interests in consideration of the transfer to each of you of 1/12th of the common stock of Simi Valley Development Company."

Thus it was made apparent that defendant Simi Valley Development Company became the vehicle for carrying out defendant Murchison's obligations without, however, relieving defendant Murchison of those obligations.

Exhibit A (the 1955 agreement) further provided:

"(b) I shall pay to you and your wife the sum of $1,000,000 of which $50,000 will be paid to you and your wife in cash at the time of the consummation of the sale by you and the purchase by me of the lands herein provided to be sold and conveyed by you to me. The balance, to wit: $950,000, shall be payable at the rate of ten cents ($0.10) per one thousand (1,000) gallons of water produced, saved and sold from the Water Lands, however, for the first two year period from the date of the consummation of the purchase of the lands herein provided to be purchased by me from you, I agree to pay you a minimum amount of $24,000 per year whether or not any water is produced, saved and sold from the Water Lands. Thereafter, however, my obligation for the payment of the balance of said $950,000 shall be limited to an amount, to be accounted for monthly or quarterly (as we may agree) equal only to ten cents ($0.10) per one thousand (1,000) gallons of water produced, saved and sold from the Water Lands but with the proviso and understanding that if during any accounting year the aggregate amount payable to you under this arrangement shall be less than $24,000 and I shall not elect to make payment of any such difference then at your option and upon your giving me thirty days prior written notice I will deliver to

you during the then current accounting year at the well head of any one or more of the wells located on the Water Lands free of cost to you at the times and in the quantities specified by you in writing from time to time such quantities of water as you may prescribe up to a total of that many gallons of water multiplied by twenty cents ($0.20) as will equal the difference between the sums paid or payable to you for the preceding calendar year and $24,000, subject, of course, to the physical ability of the wells upon the Water Lands to produce such quantities and to temporary failures and delays due to causes of force majeure. . . .

3. Subject to the physical ability of the well or wells now or hereafter located on the Water Lands to produce sufficient quantities of water so as *adequately to service the lands covered by the Montgomery Contract* with an adequate supply of water, *contemplating that such lands will be developed for residential and industrial usages,* I agree within two years from the date of the consummation of the purchase of the lands herein provided to be purchased by me from you, to install or construct or to cause to be installed or constructed a reservoir and pipe lines to transmit water produced from the Water Lands . . ." (Italics ours.)

(B) Neither you, your wife nor Messrs. Mann or Acton shall be personally liable or obligated for any expenses or costs attributable to or incurred in connection with the acquisition, operation, development, maintenance or sale or other disposition of the Montgomery Lands or any of the additional lands in the Semi [*sic*] Valley which might here-

after be acquired and which are covered by the provisions of paragraph 2(a) above, but the participation of yourself, your wife and Messrs. Acton and Mann in such lands or in the net profits therefrom, as the case may be, shall collectively be charged with one-third of all such costs and expenses . . . and it is further agreed that all obligations on my part hereunder are conditional upon my being satisfied: . . . (b) that upon my becoming the owner of the Water Lands, I shall have the exclusive right to appropriate to such lawful uses and purposes as I might designate or desire all water that may be produced from wells now or hereafter located upon said lands particularly, but not limited to, the right of dedication of the preferential rights to such water to uses thereof on (or for the benefit of) the Montgomery Lands to the exclusion of all other uses. . . .

8. In the event I shall acquire from you the Water Lands as herein provided for and at anytime thereafter such lands, or rather wells located thereon, shall no longer be capable of producing commercially pure water in commercial and paying quantities then at my option I may re-convey to you the Water Lands and thereby relieve myself of any further obligations under paragraph 2(b) hereof save and except for the payment of any then accrued but unpaid sums payable to you under said paragraph 2(b)."

Exhibit B (the 1956 agreement) further provided:

"You and Mrs. Riess shall immediately execute and deliver to me, and I shall accept, a general warranty deed covering the lands referred to in said

Letter Agreement as the 'Water Lands', together with all wells, water rights and other improvements and appurtenances thereon, which said lands are described in Exhibit A attached hereto. The monies which I have previously caused to be paid to you, aggregating the sum of $78,000.00, is, and shall be, of course, a credit on the purchase price of said water lands and other properties. . . .

(h) It shall be understood that, under Paragraph 8, I can at any time, at my option, reconvey the water lands to you and be relieved thenceforth of all obligations, if, *in my opinion,* the wells on the water lands are no longer capable of producing water in quantities sufficient to be commercially profitable to me, or if I deem that their operation is not economically feasible from my standpoint." (Italics ours.)

Appellants contend that these contracts necessarily contemplated the development of the described land by the use of water derived from the Water Lands which plaintiffs had conveyed. Particularly, appellants rely on the obligation of the defendants to pay the agreed price, the statement that the parties contemplated developing certain described lands, and the further agreement that defendant Murchison (and his assignee) were to have complete control of the operations. One other element deserves mention: the fact that the agreed minimum which was payable in cash is extremely small compared to the total amount of the agreed purchase price. It is unthinkable that defendants, having received the deed to the water lands and the sole right to control the operations, should be allowed to cease production without liability for the purchase price, or at the very least, for

the damage caused by their repudiation and abandonment.

The law respecting the subject matter appears clear. In *Acme Oil and Mining Co. v. Williams* (1903), 140 Cal. 681, at 684, the court said:

> "It is insisted by the appellant that no covenant in the lease was broken, because the two wells provided for were sunk within the required time, and royalty for such oil as was shown to be produced was paid. These, however, were not all the covenants of the lease. Covenants may be implied, as well as express, and in oil leases, and others of that particular character, where the consideration for the lease is solely the payment of royalties, there is an implied covenant, not only that the wells will be sunk, but that if oil is produced in paying quantities they will be diligently operated for the best advantage and benefit of the lessee and lessor.
>
> The sole consideration usually moving the lessor in extending oil leases is, and the only consideration for the particular lease involved here was, the royalties the lessor would receive from proper and continuous pumping of oil, after it had been developed in paying quantities. These leases are only valuable on development, and are then only valuable to both parties, to the extent that the product may be secured and disposed of, and when the only consideration for the lease is the share which the lessor will obtain of what is produced, there is always an implied covenant that diligence will be used toward such production."

To the same effect is *Jones v. Inter-State Oil Co.* (1931), 115 Cal. App. 302.

While it is true that the above cases deal with leases in which the *sole* consideration to the lessor is the agreed royalty, neither in reason nor in case law is the rule limited to situations in which the sole consideration is royalty.

In *Hartman Ranch Co. v. Associated Oil Co.* (1937), 10 Cal. 2d 232, at page 239, the court said:

> "Where express covenants do not cover completely all phases of the lessee's obligation in regard to exploration, development and protection, implied covenants may coexist with express covenants. Since the consideration for such leases is entirely *or in large part* the oil royalty payments to be made to the lessor, such covenants must be implied to protect the lessor and carry out the purpose of the lease."
>
> . . . "We conclude on this branch of the case that in the circumstances shown there was an implied covenant in the Hartman lease requiring protection from drainage through operations on adjoining land by the party in possession of the Hartman leasehold." (at p. 242.)

See also: *Sauder v. MidContinent Petroleum Co.* (1934), 282 U.S. 272, 78 L. Ed. 1255; *Rehart v. Klossner* (1941), 48 Cal. App. 2d 40.

In *Lippman v. Sears Roebuck* (1955), 44 Cal. 2d 136, the lease provided for a monthly minimum rent of $285 together with a percentage of gross sales made from the premises. (*Id.*, p. 139.) The fact that the lease provided for a monthly minimum regardless of the amount of sales did not relieve the tenant of the obligation to continue to carry on its sales on the premises.

Following is from the opinion:

> "As a general rule, it is held that a statement as to the purpose for which premises are leased does not imply a covenant by the lessee that he will engage in that use, but he may cease to use the premises for any purpose. (citation) Some courts have implied such a covenant when the rental for the premises is based upon a percentage of the proceeds from the business for which they are let. (citations) These cases rest upon a theory of interpretation similar to that employed in the consideration of 'output' contracts, where the courts have found 'from the business situation, from the conduct of the parties, *and from the startling disproportinate burden otherwise cast upon one of them,* a promise implied in fact by the seller to continue in good faith production or sales, or on the part of the buyer to maintain his business or plant as a going concern and to take its bona fide requirements. In other words, this view implies an obligation to carry out the contract in the way anticipated, and not for purposes of speculation to the injury of the other party. . . .' (1 Williston on Contracts [rev. ed. 1936], §104A, pp. 357-358.)" (at pp. 142-143.)

It should be borne in mind that the present case is not one in which defendants in good faith erred in determining whether further development was commercially feasible; on the contrary, the evidence is that defendants abandoned development for the purpose of putting economic pressure on the plaintiffs and in effect abandoned the contract.

Following are pertinent excerpts from the transcript: Marron, *defendants'* witness, testified:

"THE COURT: Do you know how much water they will produce now, or do you know how much water they are actually producing?

THE WITNESS: Well, they haven't produced water, from the information that I determined the other day, for 2 years, but at that time they were producing 75 gallons per minute." [Rep. Tr. Vol. 1, p. 118, lines 9-15.]

"Did you say there is no production from the well?

THE WITNESS: That is correct. Not to my knowledge." [Rep. Tr. Vol. 1, p. 132, lines 4-5.]

"MR. SCHWARTZ: I might state to your Honor that the purpose of these questions is not to try the case, but they deal with the question of the propriety of the conduct of Mr. Murchison and Simi Valley Development Company, which would estop them from demanding arbitration. That is the purpose of the question and I believe I am completely correct on that.

THE COURT: Let's have the question now.

(The question was read by the reporter as follows: 'Q. Now, Mr. Marron, how long has the Metropolitan Water District been supplying water to Susana Knolls Water Company?')

THE COURT: If the witness knows, I will allow him to testify.

THE WITNESS: Approximately 2 years." [Rep. Tr. Vol. 1, p. 140, line 15, to p. 141, line 4.][15]

[15]The above testimony was given in March of 1965.

Reiss, one of the plaintiffs, testified:

"Q. Mr. Riess, did you, prior to September 13, 1955, develop or drill for water on your water lands? A. I originally drilled for water there in 1936 and brought in what is known as the home well. Then I drilled, with the extreme water shortage in 1950, when the whole community was out of water, a well known as No. 1 or 0, often referred to, and supplied the whole community for 5 years with water free of charge during all that period. Then I had two wells, and in 1952 I drilled No. 2 well, the large one.

THE COURT: The No. 2 well was the large well?

THE WITNESS: The large one, yes, sir. No 1 was 1200 gallons and I operated that for about three and a half years with electric power.

THE COURT: The home well was drilled in what year?

THE WITNESS: 1936.

THE COURT: And No. 1?

THE WITNESS: No. 1 in 1950, the driller moved in in January.

THE COURT: And No. 2 was drilled when?

THE WITNESS: Completed in October 1952." [Rep. Tr. Vol. 2, p. 192, line 17, to p. 193, line 3.]

"Q. Mr. Riess, you say you pumped it for a week with the 14-inch bowls? A. The second time.

Q. The second time, and what was the production of the well? A. Again, because of a Diesel having been available, we could vary the speed

over and above the safe maximum velocity of the pump, and when we run her up to 2000, we had 2200 gallons output from the well. That, however, was only temporary, usually about 30 minutes, until the motor began to heat up. Then we steadied it down between 1750 and 1800.

THE COURT: You mean 1750 gallons?

THE WITNESS: Per minute, to 1800." [Rep. Tr. Vol. 2, p. 196, lines 3-16.]

"THE COURT: You say Mr. Murchison was personally present?

THE WITNESS: Oh, yes, Mr. Murchison was there.

THE COURT: When you made the test in 1955?

THE WITNESS: Yes, sir. He had me run the test for him and he had a half-dozen engineers with him.

THE COURT: At the time you ran this test for Mr. Murchison, what was the production of the well?

THE WITNESS: 1800 to 2000. We varied here. We opened her up full blast.

THE COURT: We are talking about No. 2 well?

THE WITNESS: No. 2 well, sir." [Rep. Tr. Vol. 2, p. 199, line 24, to p. 200, line 10.]

"Q. Was there anything done to change the physical condition of that well? A. Not No. 2, except a pump was later—not at that time, no. Later that happened.

Q. Well, at any time. A. Oh, yes, later on they pulled the big pump.

Q. Now, when was that done, do you know? A. In 1957, the latter part, or 1958.

Q. Do you know what was done to the Well No. 2? A. Yes. They pulled out the big pump, they took away my gear head and my big motor. They installed a half-capacity horsepower, 150 maximum capacity, transformer unit and motor, found out that that motor could never operate that big pump, pulled it and put a half-uze pump in and set it at 85 feet lesser depth, and called that a test." [Rep. Tr. Vol. 2, p. 207, line 22, to p. 208, line 11.]

"Q. Mr. Riess, I call your attention to Riess Well No. 1, which you previously testified was completed in 1950 and was producing 1200 gallons per minute. I will ask you to state whether that well, Reiss Well No. 1, was tested after 1952.

THE COURT: Before we get into that, can you tell me when Riess Well No. 1 was drilled?

THE WITNESS: 1950.

THE COURT: At the time the drilling was completed, did you make a test?

THE WITNESS: Yes, repeated tests.

THE COURT: How much water did the tests show Well No. 1 could produce?

THE WITNESS: We pumped 1200 gallons on a test run for numerous days with a Diesel engine." [Rep. Tr. Vol. 2, p. 228, lines 11-25.]

"Q. Mr. Riess, subsequent to 1954, were any tests made of Riess No. 1? A. Yes, sir.

Q. Were you present? A. Yes.

Q. And can you state who made the tests? A. Mr. Spence, a Murchison engineer.

Q. And when was that? A. Sometime in 1954—I would have to guess, if I say it was April or it was May—I do not know, because he came back again later.

Q. Was anyone else other than Mr. Spence there? A Mr. Acton and Mr. Guy Mann of Dallas.

Q. And you were present? A. Oh, yes.

Q. Did I understand you to say Mr. Spence was one of the engineers for Mr. Murchison? A. Yes. He worked under Clifford Smith and the Delhi-Taylor engineer, geologist.

Q. Did the test pumping made at that time indicate what the well production of the No. 1 was? A. Right, at that time, prior to the change of the pump.

Q. What's that? A. Prior to the change of the pump.

Q. What was the production? A. 1000 gallons. She was geared to an electric motor and it couldn't be different." [Rep. Tr. Vol. 2, p. 232, line 14, to p. 233, line 16.]

"A. After the second agreement was signed, the Dallas people moved back in and pulled the pump on No. 1 in order that, according to Murchison's instructions, the well could be deepened to 800 into the same fissure that the huge No. 2 supply came from and a larger pipe installed in the hole to accommodate an equally large pump as we had in No. 2.

Q. Was a deepening undertaken? A. No, it was pulled and the well was deepened from around 440 to 800 by Hall Drilling Company.

THE COURT: You said 440. You mean 440 feet?

THE WITNESS: 440 feet.

THE COURT: To 800 feet?

THE WITNESS: To 800 feet.

. . .

Q. Mr. Riess, will you state to the court what happened when the deepening of No. 1 was undertaken? A. When No. 1 was driven below the 600 feet from the original bottom, new hole was made, we encountered a large fissure in which the drill stem, the bit on the stem that does the drilling, broke loose and buried itself partially in the crevice, or in the fissure. Then they proceeded to try to fish it, for several weeks worked around the clock, but they could not release it because it had been in on a 45 degree angle, and weighing maybe 3000 pounds. It was a big bit, star bit.

When finally the order was given by Mr. Adams to Mr. Hall to shoot it in the hole and keep going down, so they put a lot of dynamite in the hole. I talked to Mr. Adams about it and he said, 'Well, we bought you out. This is our business.'

And they did shoot that bit in and it went down to 800 foot.

Q. Was anything done to the well after that? A. No. Then he moved the same drill rig on No. 8." [Rep. Tr. Vol. 2, p. 234, line 23, to p. 236, line 11.]

"THE WITNESS: Then I asked Mr. Adams to please put the casing down to bottom so we don't lose the well.

He said, 'We don't need that well. We have plenty already. They are going.'

BY MR. SCHWARTZ:

Q. Was there a pumping unit installed in that well—

. . .

Q. Was that taken out again? A. Oh, yes.

Q. To your knowledge, was that pumping unit at any time put back into the hole, or any pumping unit? A. No. It was capped.

THE COURT: When was it capped?

THE WITNESS: Right about that time, sir.

THE COURT: Well, when was that?

THE WITNESS: I would say within 2 hours after the pump was out, because it was too close to the street for kids to fall in.

THE COURT: What year was that?

THE WITNESS: In September 1956.

THE COURT: It has remained capped since that time?

THE WITNESS: Yes, sir." [Rep. Tr. Vol. 2, pp. 237-238.]

"Q. Mr. Riess, was that Well No. 3 tested after it was completed?

THE COURT: You mean after it was re-drilled?

MR. SCHWARTZ: Redrilled, yes, your Honor.

THE COURT: All right.

THE WITNESS: That is correct. It was tested after drilling, or redrilling, you call it." [Rep. Tr. Vol. 2, p. 237, line 10, to p. 240, line 2.]

"Q. Mr. Riess, after the completion and testing of Riess No. 3 after it was redrilled in 1956, was

there anything done to that well? A. It was capped, covered over, and a flower bed set on it." [Rep. Tr. Vol. 2, p. 242, lines 21-25.]

"Q. To your knowledge, was any pumping unit installed afterwards? A. A little later, a year later or so, a little domestic unit was installed. It was reopened and a little domestic unit was put in, because my huge pump and Diesel was just impossible to use.

THE COURT: Reopened? Was that in 1957?

THE WITNESS: 1957 or 1958." [Rep. Tr. Vol. 2, p. 243, lines 14-21.]

"Q. I will ask you this. Was that Riess No. 3 redrilled, after it was redrilled was it bailed? A. No, no, no. We knew we had more water than we could bail. It was immediately put on the pump.

Q. Were you there when it was put on the pump? A. Yes. I observed the pumping. Not the whole 24 hours round, but daily." [Rep. Tr. Vol. 2, p. 246, lines 15-21.]

"Q. Mr. Riess, was Riess No. 4 cased? A. No, never completed nor cased." [Rep. Tr. Vol. 2, p. 252, lines 24-25.]

"THE COURT: All right. May I ask another question? What happened to it? Was it capped?

THE WITNESS: Oh, yes, they capped it. There was liability from kids falling down or something." [Rep. Tr. Vol. 2, p. 254, lines 7-10.]

"Q. To your knowledge, Mr. Riess, that well ever since it was drilled in, I believe you said August or September, 1956, No. 4, has it ever been.

and since it has been capped, ever been pumped? A. No.

Q. And has any installation been made of any pumping unit or equipment in that well? A. No, sir." [Rep. Tr. Vol. 2, p. 255, lines 2-9.]

"Q. Did Mr. Adams ask you to talk to Mr. Cobb? A. Mr. Adams asked me to talk to Mr. Cobb.

Q. Did you talk to Mr. Cobb on the subject relating to the activity of the wells, Reiss Wells 1, 2 and 3? A. I did.

Q. When? A. Right a day or two after the Adams discussion with me when he said, 'We are satisfied. We are quitting all further development.'" [Rep. Tr. Vol. 3, p. 296, line 18, to p. 297, line 1.]

"[The Witness] . . . I asked Mr. Cobb to please see that the No. 1 well is at least cased before it is capped, so it doesn't get lost.

BY MR. SCHWARTZ:

Q. Is that all the conversation? A. Well, we were talking a long time. He said, 'We don't care for any more wells. We have all the water we need. We are in the process of selling and it is up to the new man, the new owner, to take on any further well drilling obligations if he wants to develop more water.'" [Rep. Tr. Vol. 3, p. 300, lines 11-20.]

"THE WITNESS: Mr. Costin did the speaking.

THE COURT: Mr. Who?

THE WITNESS: Mr. Costin, c-o-s-t-i-n. He was president of the company then.

THE COURT: President of what company?

THE WITNESS: Simi Valley Development Company.

BY MR. SCHWARTZ:

Q. Do you know his first name? A. Glen.

Q. Just state what was said regarding a threat. A. I was just told that they made a bad deal with Manley, they are getting the property back and I got to make a new deal with them, or else I get nothing, *they will sit on it, wait until the Metropolitan comes in,* and then I am boxed in, my wells wouldn't be worth anything and I am out. They told me that and my wife." [Rep. Tr. Vol. 3, p. 309, line 21, to p. 310, line 11.] (Italics ours.)

Attention is directed to the letter of defendant Simi Valley Development Company (attached to the Declaration of Stephan Riess), commencing at Clerk's Transcript page 65, in which that defendant stated what it would do, and added:

"You would quitclaim all rights, title and interest in any stock of Simi Valley Development Co.

The water requirements of the residence formerly occupied by you, its appurtenances, would be supplied without cost.

The existing controversy in respect to the $18,000.00 would be disposed of by Simi paying to you the sum of $9000.00 at the time of the execution of the agreement."

The court is respectfully referred to the excerpts from the transcript which are reprinted in this brief under the heading "Respondents Repudiated Their Contract with Appellants and Thus Lost Their Right to Arbitrate."

Appellants further point out that the plaintiffs' quoted testimony was not denied.[16] Indeed, defendants filed no answer, and put on no rebuttal testimony whatever.

On the record below, it is clear that defendants abandoned, as well as repudiated, the contract. The effect of abandonment, with respect to arbitration, has the same effect as does repudiation. If a party to a contract abandons it, he cannot thereafter claim the right to arbitrate under its terms.

In *Banks v. Calstar Petroleum Co.* (1947), 82 Cal. App. 2d 789, at pages 792, 793 the court said:

> "The lease contained the following provision: 'In the event of any controversy between the parties as to any matters of fact arising under this lease, such question of fact shall be submitted to arbitration, and the decision of the arbitrators thereon shall be a condition precedent to the right of action on the lease itself.'
>
> "Appellant contends that two questions of fact arose which required arbitration under the quoted provision of the lease, to wit: what acts were done or not done by appellant which would evidence an abandoment of the lease, and what damages did respondents sustain by reason of the failure of the lessee to execute a quitclaim deed? Fourteen months before respondents gave notice of default appellant had done all that could possibly be done to indicate its abandonment of the lease and its intention to abandon. Its failure to produce oil, its

[16]Certain denials concerning the quantity of water were made by defendant's reply affidavit; but there were no denials that defendants had capped the wells, ceased production, and intended to wait for Metropolitan water to come in.

failure to drill the well to a deeper oil sand, its notice to the Division of Oil and Gas of its intention to abandon, and its plugging the well so as to make it unusable constituted a complete abandonment, thus removing that question from any possibility of arbitration."

The pertinent provisions of the California statute with respect to arbitration (Cal. Code Civ. Proc., Sec. 1281.2), provides as follows:

"On the petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

(a) The right to compel arbitration has been waived by the petitioner; or

(b) *Grounds exist for the revocation of the agreement.*" (Italics ours.)

Hanes v. Coffee (1931), 212 Cal. 777, involved an oil lease containing an arbitration clause. Plaintiff brought suit without submitting to arbitration and had judgment. In affirming the judgment for the plaintiff, the Supreme Court of California said:

"The next contention is that the controversy leading to the present action should have been arbitrated, under the terms of the lease. The provision in the instrument reads as follows:

'Should the parties hereto not agree as to any question of fact affecting the rights of the parties

hereto, such difference shall be settled by arbitration, each party to appoint an arbitrator, and they to appoint a third arbitrator, and the written findings of any two arbitrators to be binding on the parties hereto.'

Conceding that this provision would be enforceable under our statutes, we do not think that it is applicable to the present controversy, in which the lessor contends that by reason of failure of the lessee to commence operations within the specified period, the lease never became operative, or if it did, is now terminated. The provision clearly does not contemplate that this question shall be submitted to arbitration, since if the allegations of plaintiffs' complaint are sustained, the result is that the lease, including the arbitration provision, is wholly inoperative, and the lessee can claim no rights thereunder."

C. There Were Partial Breaches of the Contract Coupled With a Total Repudiation; Defendants Have Accordingly Lost All Rights Under the Contract and Cannot Require the Plaintiffs to Comply With Any of Its Terms.

In the former hearing the trial court found, and this court affirmed on appeal, that the defendants committed partial breaches of contract when (1) they paid the sum of $30,000.00 to plaintiff instead of $48,000 which was due during the two years immediately following the consummation date; and (2) that the Buyers breached said contract by failing to pay the Sellers at the contract rate for water produced, saved and sold by them from the waterlands. [See Former Record, Finds.

IV and VI; this court court reversed on the issue of defendants' duty to extend water lines and build reservoirs, but affirmed the breaches with respect to making payment.] These partial breaches were coupled with a repudiation and so constitute a "total breach of contract", justifying immediate action for damages. [The Former Record was before the District Court on the Petition for Arbitration, Rep. Tr. Vol. 1, p. 57.]

4 Corbin on Contracts, Section 954 (1951) states:

> ". . . Suppose next that the contract requires performance in instalments or continues for some period in that there has been such a partial failure of performance as justifies immediate action for partial breach. *If this partial breach is accompanied by repudiation of the contractual obligations, such repudiation is anticipatory with respect to the performance that are not yet due.*
>
> In most cases, the repudiator is now regarded as having committed a 'total' breach, justifying immediate action for the remedies appropriate thereto." (Italics ours.)

The repudiation of the contract by the defendants amounting to a total breach has heretofore been stated.

This evidence showed unequivocally that the defendants had in fact repudiated the contract.

While Murchison and Simi Valley Development Company did in fact commence operations in the pumping of the water, they did not pursue them but stopped

after finding water. [See excerpts from Reporter's Transcript hereinabove quoted.]

In the *Swinerton* case, *supra,* the defendant lessee repudiated by words, *i.e.,* that unless the plaintiff lessor would accept the assignment, they would have nothing further to do with the property or contract. In this case, the defendant purchasers went further. They set conditions upon their performance in violation of the agreement.

Summarizing the argument with respect to defendants' right to arbitrate, appellants urge:

1. The Complaint before the court below was based on defendants' repudiation; the court erred in ordering arbitration; if in fact there was a repudiation by defendants there was no longer any agreement which gave the defendants the right to require arbitration.

2. On the record as made, repudiation was alleged, proved by affidavit and testimony, and was never denied. This court should reverse on the ground of defendant's repudiation.

3. On the record below, it appears without denial that defendants abandoned the contract. This court should reverse the order for arbitration on the ground of defendants' abandonment of the contract.

III.

The District Court Erred in Failing to Make Findings of Fact in Support of Its Order Staying Proceedings.

The order appealed from contained the following:

> "All proceedings in the above entitled action are stayed pending the decision of the arbitrators." [Clk. Tr. commencing at p. 192.]

Appellants urge that this order is tantamount to an injunction.

The point was expressly decided in *Shanferoke C. & S. Corp. v. Westchester Corp.* (1934), 293 U.S. 449, 79 L. Ed. 483. The defendant in a contract suit pleaded an agreement to arbitrate and asked for a stay. The District Court denied the stay; the Court of Appeals reversed and granted the stay. The Supreme Court granted certiorari and affirmed the holding of the Circuit Court saying (at 293 U.S. 451 and 452) that the denial of the stay was equivalent to the denial of an injunction.

The case is directly controlling because Rules 52 and 65(d) of Federal Rules of Civil Procedure make no distinction between granting and denying an injunction so far as the duty to make Findings.

In *Carey v. Carter* (1965, C.A.D.C.), 344 F. 2d 567, the District Court had denied a stay of proceedings, but failed to make Findings of Fact. The Circuit Court of Appeals vacated the judgment and remanded the cause on that ground, saying:

> "The denial of a stay pending exhaustion of contractual grievance procedures was 'in effect an

order denying an interlocutory injunction' and is thus appealable. And since the motion was in effect for an interlocutory injunction, Rule 52(a), FED. R. CIV. P., applied. This rule requires that 'in granting or refusing interlocutory injunctions the court shall . . . set forth the findings of fact and conclusions of law which constitute the grounds of its action.' Here the court's failure to comply with this rule precludes 'a proper review of the action of [the] court.' Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310, 316, 60 S. Ct. 517, 520, 84 L. Ed. 774 (1940)." (at p. 568.)

Wilco v. Swan (1953, C.C.A. 2d), 201 F. 2d 439, holds that an order denying a stay of proceedings to permit arbitration is equivalent to an order denying an interlocutory injunction. Following is from the opinion:

"Before answering the complaint, Hayden, Stone & Co. moved, pursuant to section 3 of the Federal Arbitaation Act, 9 U.S.C.A. §3, for an order staying all proceedings in the action until an arbitration has been had in accordance with the terms of a margin agreement entered into between the plaintiff and firm of Hayden, Stone & Co. In a carefully reasoned opinion reported in 107 F. Supp. 75, Judge Goddard denied the motion. Hayden Stone & Co. have appealed.

"Although the order is interlocutory, it is appealable, since it is in effect an order denying an interlocutory injunction. Shanferoke Coal & Supply Corp. of Del. v. Westchester Co., 293 U.S. 449, 55 S. Ct. 95, 79 L. Ed. 647." (at p. 441.)

The order here appealed from failed to comply with the requirements of Rule 52(a) and Rule 65(d) of the Rules of Federal Civil Procedure. Those rules state, in part:

> Rule 52: . . . "and in granting or reviewing interlocutory judgments the courts shall similarly set forth the Findings of Fact and Conclusions of Law which constitute the grounds of its action."
> Rule 65: "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; . . ."

Rule 52 is explicit; it requires Findings of Fact. Rule 65(d) has been held to require Findings of Fact or statements or recitals at least equivalent to Findings. (See *Sims v. Greene* (1947, C.C.A. 3), 161 F. 2d 87, at p. 89.)

The order here appealed from made no Findings sufficient to comply with the Rules. The Former Record contained Findings of breaches; further evidence of at least partial breach was introduced, together with undenied evidence of repudiation and abandonment, thus constituting a total breach, at least of defendants' obligations which yet remained to be performed. The transcript indicates that the District Court limited its hearing to the consideration of voluntary waiver and estoppel, and perhaps gave no consideration whatever to repudiation or abandonment.

Nevertheless, the order appealed from recited that the defendants are not in default. It is submitted that this is a conclusion of law, and is not a finding of fact; in any event, it is erroneous. The appearance in the order of this conclusion of law is inexplicable in view of the court's repeated statements that it limited its hearing to

issues of waiver and estoppel. [*E.g.,* Rep. Tr. Vol. 5, p. 673, lines 16-20; Vol. 5, p. 556, lines 13-18.]

As has been shown, Findings of breaches were made in the Former Record, and the evidence of defendants' repudiation and abandonment of the contract has not been denied.

The order is further deficient in failing to make Findings of Fact with respect to the issue of repudiation and abandonment alleged in the verified Complaint, in the declaration in opposition to the petition for a stay, and testified to by Marron (defendants' witness) and by Riess, as herein elsewhere in this brief quoted.

As has been pointed out, the conclusion that the defendants are not in default would dispose of the necessity of arbitration, and would make any arbitration meaningless. Defendants have claimed in the proceedings below that arbitration was necessary to determine whether an obligation (presumably to build the reservoirs and extend the pipe lines) existed at all before it could be determined that such a breach had been committed. But a conclusion that the defendants were not in default pre-judges the arbitration and its consequences.

Without wishing to dilute appellants' argument that the evidence showed repudiation and abandonment of the contract by defendants, appellants under this branch of the argument further urge that in any event the order for stay must be vacated for failure to make Findings of Fact.

IV.

In Any Event, the Inclusion in the Order Appealed From of a Statement That Defendants Were Not in Default Was Clearly Erroneous, and the Order Should Be Reversed.

Although the District Court made various statements during the hearing of the Petition for Stay and for Arbitration, it is believed that the following statements of the District Court reflect its ultimate conclusion:

> "THE COURT: So you go ahead. The thing we are interested in now is the question of estoppel, not anything else. If Mr. Murchison or his assigns have not been estopped from demanding arbitration, I am going to have to order arbitration. I am going to have to order it. So the only thing we are interested in now is the question of estoppel." [Rep. Tr. Vol. 4, p. 416, lines 3-8.]

At a later hearing (on March 23, 1965) the court said:

> "THE COURT: In order to raise the doctrine of estoppel against Mr. Murchison, you are going to have to prove that Mr. Murchison made certain statements or agreed to do certain things upon which Mr. Riess relied." [Rep. Tr. Vol. 5, p. 556, lines 12-15.]

Almost at the end of the hearing, Judge Westover said:

> "THE COURT: Now, it may be very true, it may be, Mr. Schwartz, that when they get over this hurdle of arbitration, I may come to the conclusion that there has been an entire repudiation of this contract. I don't know. I am not passing upon that. *That is something for the future.*" [Rep. Tr. Vol. 5, p. 673, lines 16-20.] (Italics ours.)

As has been shown under other headings in this brief, there was clear, undenied, evidence of default, repudiation and abandonment. Judge Westover indicated his state of mind near the close of the hearing, as follows:

> "THE COURT: It seems to me the court could hold that there has been a total repudiation of the balance of the contract, but how in the world the court could hold that there has been a total repudiation of the entire contract, I don't know." [Rep. Tr. Vol. 5, p. 706, lines 12-16.]

In fact, defendants' counsel stipulated that defendants were obligated to pay for all water produced from the wells. [Rep. Tr. p. 512, line 13, to p. 513, line 10.] There is no question but that this obligation to pay for water has never been performed. [See admission of defendants' counsel, Rep. Tr. Vol. 2, p. 297, lines 12-23.]

If appellants are right in their contention that the District Court should have considered the question of the repudiation and abandonment before ordering arbitration, then the order appealed from is erroneous, because it would appear that the District Court considered only the questions of estoppel and express waiver; accordingly the statement in the Order that defendants were not in default is erroneous.

If, however, the court did consider the evidence of defendants' repudiation and abandonment, then the order should be reversed because the conclusion that the defendants were not in default is clearly erroneous. The existence of numerous breaches was not denied, and the Findings of the court in the Former Record have not been altered.

Further, the District Court cannot have intended to exonerate the defendants from all default, because, as has been urged, such a determination would render the arbitration an absurdity. The avowed purpose of defendants' petition for arbitration was to determine the existence or non-existence of the defendants' obligation (to build a reservoir and to extend pipe lines) which plaintiffs claimed defendants had not performed.

In the former hearing the court found that the defendants had breached the contract by failure to pay money for the two year period and by failure to pay for water produced and served. As has been pointed out, these findings were affirmed on appeal to this court. No evidence was introduced by anyone to alter the effect of those findings and affirmation on appeal.

Finally, the Third Amended Complaint alleged numerous breaches, the sale of water lands, as well as total repudiation by defendants. There has been no Answer to the Complaint and, of course, there has been no hearing on the allegations of the Complaint. To allow the court's present order to remain without correction would, in effect, constitute a holding that the defendants were not in default; and such holding would seriously prejudice plaintiffs in a trial on the merits, no matter what the results of the arbitration might be.

Conclusion.

A review of this litigation shows that defendants have had the use of plaintiffs' land for approximately ten years; that although defendants have made some payment, approximately 9/10ths of the agreed purchase price has not been paid. The trial court found defendants were in default in making cash payments under

the contract and also in default in payment for water produced (Opinion, *Riess v. Murchison,* former appeal); the reversal by this court related only to the failure to arbitrate a question of partial performance under Paragraph 3, Exhibit A. (Defendants' obligation to extend water lines and to build reservoirs.)

The Complaint filed after remittur alleged a total breach by defendants, and thus rendered irrelevant the question of arbitration (with respect to performance, under Par. 3), at least until there were a determination of the issue of repudiation.

Appellants must say that they were unable to determine with complete certainty whether the lower court, on the hearing of respondents' Petition for Stay and Arbitration, actually considered the question of repudiation. An examination of the entire transcript leaves appellants with the belief that the District Court did not consider that question, but limited its consideration, at defendants' urging, to issues of waiver and estoppel.

Whether the lower court did so or not, it is clear that the court erred. It should have heard the question of the total breach before hearing the petition for arbitration.

In any event, it should have determined the question of total breach as a defense to the Petition for Stay and Arbitration. The District Court did neither.

The record made on the hearing below requires a finding of total breach. A reversal by this court with instructions to vacate the order for arbitration and stay on the ground that defendants repudiated the contract, would go far toward accomplishing justice, and would

also help dispose of this long, costly, seemingly interminable litigation. However, if this court should believe that it should not give such instructions, this court should in any event reverse the order appealed from on any one or more of the other grounds urged in this brief. Specifically, it appears clear that the issue of repudiation must be determined before the court can consider a petition for arbitration, and if repudiation is found, no arbitration can be ordered.

Respectfully submitted,

MORRIS E. COHN,
Attorney for Appellants.

Certificate of Counsel.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with the Rules.

MORRIS E. COHN

EXHIBIT "A".

28463

September 13, 1955

Dr. Stephan Riess
Santa Susana, California

Dear Dr. Riess:

This letter agreement shall serve to evidence and confirm the basic general understandings and agreements entered into between us this date relative to the acquisition by me, or my nominees, designees or assignees (and it is understood that throughout this letter all references to me shall include my nominees, designees and assignees, if any), of certain lands now owned by you and your wife and the water rights pertaining thereto and the water wells situated thereon and the participation by you and your wife and Len Acton and Guy L. Mann, collectively, in the proportion of one-half by you and your wife and one-half by Messrs. Acton and Mann, in (a) the lands or the income and profits therefrom located in Ventura County, California which I have contracted, by contract dated August 26, 1955, to purchase from one M. Laurence Montgomery and (b) certain other lands which I might hereafter acquire in the area known as the Semi Valley of California.

Our basic agreements and understandings are in general as follows:

1. You have represented and hereby do represent that you and your wife own good and merchantable title to certain lands in Ventura County, California comprixing approximately 300 lots plus approximately three and one-half acres upon a portion of which there is presently located one or

more wells capable of producing many millions of gallons of commercially pure water (the portion of which lands upon which such well or wells are located are hereinafter referred to as the "Water Lands"), and hereby you agree to convey to me and I agree to purchase from you and your wife all such lands and all other lands owned by you in Ventura County, California, save and except the approximately two acres upon which your home and your domestic well is situated, for the consideration and upon and subject to the terms, provisions and conditions hereinafter set forth. With respect to such excepted lands you shall also assign and convey to me all water rights appurtenant to same save and except such water as may be produced from any well on said excepted lands for domestic uses and with the understanding, however, that I shall not have any rights to the use of the surface of such excepted lands, or any portion thereof, in any operations connected with the water rights appurtenant thereto. I shall have the "first right of refusal" for thirty days at appraised value to purchase such excepted lands in the event you should ever elect or desire to sell or otherwise dispose of same.

2. In consideration for such lands and water rights I agree to:

(a) Grant unto you, your wife, Len Acton and Guy L. Mann, collectively, but in the proportions of one-half to you and your wife and one-half to Messrs. Acton and Mann, a one-third participation in the lands of the net profits therefrom covered by the aforesaid contract between

myself and M. Laurence Montgomery (hereinafter called the "Montgomery Lands") together with a like interest or participation in such other lands as I might hereafter acquire within the said Semi Valley as may be serviced by water from wells now or hereafter located upon the Water Lands. This interest or participation in such lands shall be either in the character of an undivided one-third title to the fee thereof or the right to receive one-third of the net profits to be derived from the operation, development and/or sale thereof or an interest in a limited partnership which would own such lands and in which you, your wife and Messrs. Acton and Mann would be limited partners and I would be the general partner as we may mutually agree upon after due consideration is given to the practicalities of the situation, the legal protection to you, your wife and Messrs. Acton and Mann from the possibility of any dilutions or cutting-off of your rights or equities by virtue of creditor actions, sales to bona fide purchasers or other such occurrences. In any event, however, it is agreed that regardless of the nature or character of the interest and participation of yourself, your wife and Messrs. Action and Mann in said lands or in the net profits therefrom, I shall have full discretionary rights of management, control and disposition of such lands regardless of the character of yours, your wife's and Messrs. Acton's and Mann's said rights and interests therein. Also it is agreed that I shall have the "first right of refusal" for thirty days to acquire the respective

said interests of yourself, your wife and Messrs. Acton and Mann in such lands or in the net profits therefrom, as the case may be, in the event of any proposed sale or other disposition of any portion of any of such interests. If within ninety days from the date hereof we are unable to reach an agreement satisfactory to me as to the nature or character that the rights and interests of yourself, your wife and Messrs. Acton and Mann in and to said lands (i. e. the Montgomery Lands and the additional lands, if any, in the Semi Valley above provided for) is to be, that is to say, whether such rights and interests are to be in the form of an undivided one-third of the fee or the right to receive one-third of the net profits derived from the operation, development and/or sale of such lands or in the nature of a limited partnership interest, then at my option I shall have the right to terminate this agreement in its entirety.

(b) I shall pay to you and your wife the sum of $1,000,000 of which $50,000 will be paid to you and your wife in cash at the time of the consummation of the sale by you and the purchase by me of the lands herein provided to be sold and conveyed by you to me. The balance, to wit: $950,000, shall be payable at the rate of ten cents ($0.10) per one thousand (1,000) gallons of water produced, saved and sold from the Water Lands, however, for the first two year period from the date of the consummation of the purchase of the lands herein provided to be purchased by me from you, I agree to pay you a

minimum amount of $24,000 per year whether or not any water is produced, saved and sold from the Water Lands. Thereafter, however, my obligation for the payment of the balance of said $950,000 shall be limited to an amount, to be accounted for monthly or quarterly (as we may agree) equal only to ten cents ($0.10) per one thousand (1,000) gallons of water produced, saved and sold from the Water Lands but with the proviso and understanding that if during any accounting year the aggregate amount payable to you under this arrangement shall be less than $24,000 and I shall not elect to make payment of any such difference then at your option and upon your giving me thirty days prior written notice I will deliver to you during the then current accounting year at the well head of any one or more of the wells located on the Water Lands free of cost to you at the times and in the quantities specified by you in writing from time to time such quantities of water as you may prescribe up to a total of that many gallons of water multiplied by twenty cents ($0.20) as will equal the difference between the sums paid or payable to you for the preceding calendar year and $24,000, subject, of course, to the physical ability of the wells upon the Water Lands to produce such quantities and to temporary failures and delays due to causes of force majeure. In the event I should elect to make payment of any such deficiency in said $24,000 for any accounting year then it is agreed that if for the next accounting year you shall be entitled to receive in excess of $24,000 I shall be allowed a credit for

such amount of the excess for such next accounting year, but not otherwise, up to the amount of the deficiency so paid by me with respect to the preceding accounting year. This shall be on an accounting year to year basis and shall not be cumulative from accounting year to year.

3. Subject to the physical ability of the well or wells now or hereafter located on the Water Lands to produce sufficient quantities of water so as adequately to service the lands covered by the Montgomery Contract with an adequate supply of water, contemplating that such lands will be developed for residential and industrial usages, I agree within two years from the date of the consummation of the purchase of the lands herein provided to be purchased by me from you, to install or construct or to cause to be installed or constructed a reservoir and pipe lines to transmit water produced from the Water Lands at least to the nearest boundaries of each of the three tracts of land covered by the Montgomery Contract.

4. To secure you in the fulfillment of my obligations under paragraph 2(b) above you shall have a prior lien and deed of trust upon the Water Lands but under such deed of trust I shall be obligated to give you no more than a special warranty of title.

5. (A) With regard to the participation of yourself, your wife and Messrs. Acton and Mann in the Montgomery Lands or in the net profits therefrom, as the case may be, any sales, transfers or conveyances to the rights and equities of yourself, your wife and Messrs. Acton and Mann

and any affiliated interest to which same might be transferred shall expressly recognize and agree to honor such rights and equities. The term "affiliated interests" is hereby defined to mean and include all corporations or other business entities owned or controlled by me, the members of my immediate family and the members of their immediate families, all trusts of which I or any member of my immediate family or any member of their immediate families might be a beneficiary and all corporations owned or controlled by any of such persons or trusts.

(B) Neither you, your wife nor Messrs. Mann or Acton shall be personally liable or obligated for any expenses or costs attributable to or incurred in connection with the acquisition, operation, development, maintenance or sale or other disposition of the Montgomery Lands or any of the additional lands in the Semi Valley which might hereafter be acquired and which are covered by the provisions of paragraph 2(a) above, but the participation of yourself, your wife and Messrs. Acton and Mann in such lands or in the net profits therefrom, as the case may be, shall collectively be charged with one-third of all such costs and expenses. In this regard, however, I agree that in the event any unreasonable expenses shall be incurred in connection with or attributable to the operation, development, maintenance or sale or other disposition of such lands, or any portion thereof, the said interest and participation of yourself, your wife and Messrs. Acton and Mann will be charged only with one-third of such amount

thereof as shall be reasonable as determined after giving effect and consideration to all pertinent and relevant factors pertaining to the incurring of any such expenses claimed to be unreasonable.

(C) It is agreed that, anything herein to the contrary notwithstanding, all costs and expenses heretofore incurred or paid to you or for your account by The Murmanill Corporation or Messrs. Acton or Mann attributable to the formation of the deal and transactions contemplated hereby up to but not to exceed $25,000 in the aggregate shall at my option either be deducted from the balance of $950,000 deferred purchase price provided in paragraph 2(b) or shall be charged against and payable out of the first monies accruing and payable to you, your wife and Messrs. Acton and Mann from yours and their interest and participation in the Montgomery Lands. All sums paid or payable to you during or for the first two year period provided for in paragraph 2(b) hereof in excess of the amounts which during such two year period would otherwise be payable to you on the basis of ten cents ($0.10) per one thousand (1,000) gallons of water produced, saved and sold from the Water Lands shall be charged to the interest and participation of yourself, your wife and Messrs. Acton and Mann in the Montgomery Lands or the net profits therefrom or the interest of yourself, your wife and Messrs. Acton and Mann in any limited partnership created in respect of the Montgomery Lands, as the case may be, and shall be repaid by you, your wife and Messrs. Acton and Mann out of the first monies accruing and payable to you from such

interest and participation and to secure such repayment I shall have first lien and assignment upon said interest and participation.

6. It is agreed that I shall have ninety days from the date hereof in which to make, or to cause to be made, an investigation as to the merchantability of your title to the lands herein provided to be purchased by me and of the merchantability of your title to the water rights appertaining to such lands and as to the right of the owner of the Water Lands to exclusively appropriate to his or its own uses and purposes uses and/or to purposes designated by him or it all water that can be produced from wells located upon such lands, and it is further agreed that all obligations on my part hereunder are conditional upon my being satisfied:

(a) that you have good and merchantable title to all lands herein provided to be purchased by me from you and all of the water rights appertaining thereto and to all of the water that may be produced from wells now or hereafter located on the Water Lands; and

(b) that upon my becoming the owner of the Water Lands, I shall have the exclusive right to appropriate to such lawful uses and purposes as I might designate or desire all water that may be produced from wells now or hereafter located upon said lands particularly, but not limited to, the right of dedication of the preferential rights to such water to uses thereof on (or for the benefit of) the Montgomery Lands to the exclusion of all other uses.

With respect to the foregoing I understand that for some time now you have been furnishing from wells located on the Water Lands on a temporary and emergency basis some water to the Santa Susana Mutual Water Company, and it is agreed that you may continue to supply water from such wells to said water company upon a temporary and emergency basis only and upon the condition that such service may be discontinued at anytime upon reasonable notice in no event to be more than ninety days notice.

7. In the event of the consummation of the purchase of the lands herein provided to be sold by you to me, the deed or deeds executed by you and your wife shall contain covenants of general warranty both as to such lands and as to the water rights appertaining thereto. Also by such deed or deeds you shall convey to me without any additional consideration all well equipment, pipe, pumps and other such property now owned by you and used or useful in the operation and maintenance of the wells now located on the Water Lands and in the drilling of additional wells.

8. In the event I shall acquire from you the Water Lands as herein provided for and at anytime thereafter such lands, or rather wells located thereon, shall no longer be capable of producing commercially pure water in commercial and paying quantities then at my option I may re-convey to you the Water Lands and thereby relieve myself of any further obligations under paragraph 2(b) hereof save and except for the payment of any then accrued but unpaid sums payable to you under said paragraph 2(b). If I should exercise the

rights accorded me under this paragraph I shall have the right to salvage and remove from the Water Lands all fixtures, improvements and personal property located thereon owned by me. Also if I should exercise such rights I shall not be responsible or liable to you for the condition of any wells located on said Water Lands.

9. It is agreed and understood that this letter agreement is intended only to reflect and record in general our basic and general understandings and agreements with respect to the subject matter hereof, and we each agree, therefore, upon any reasonable request by the other to make and enter into such further and additional more formal written contracts as may be necessary or desirable to more effectually carry out, reflect and record the true intentions and purposes of this agreement.

10. As set forth above, all references herein to myself shall also include any nominees or designees of mine and the agreements herein contained on my part shall be binding upon and shall inure to the benefit of my heirs and assigns, it being expressly contemplated by me that I will assign my rights and my obligations hereunder to an affiliated interest (as that term is hereinabove defined). By the same token, it is agreed and understood that all references to you herein shall also include your wife and the agreements herein contained shall be binding upon you and your wife and yours and your wife's respective heirs, representatives and assigns.

11. For the purposes of the investigations provided for in paragraph 6 above, you agree to make

available to me or to my representatives all data and information that you may possess or to which you may have reasonable access pertaining to the matters provided for in said paragraph 6 and also to make yourself available at reasonable times and upon reasonable notice for conferences and discussions as to such matters, however, if any expenses are incurred by you in connection therewith I will bear and pay same or will reimburse you therefor.

12. During the past several weeks representatives of mine have made certain examinations of and tests with respect to the wells presently located on the Water Lands and you acknowledge that such examinations and tests have not in any manner damaged such wells. Also it is agreed that during the period provided for in paragraph 6 hereof representatives of mine may make further and additional tests of and with respect to the wells presently located on the Water Lands and it is agreed that I shall not be liable to you for any damage occasioned to any of said wells by any such tests provided you agree in advance as to such tests and further provided that my representatives do not conduct same negligently.

If the above and foregoing adequately and accurately reflects your understanding of the basic and general agreements and understandings between us regarding the subject matter hereof, please sign and have your wife sign the copy hereof handed you herewith and return such copy to me where upon this letter shall become and constitute a binding contract between us in accordance with the terms hereof.

Very truly yours,

/s/ C. W. Murchison

The above and foregoing is hereby approved and accepted as of the 14th day of September, 1955.

28463. Recorded at Request of Stephan Riess at 45 Min. Past 3 P. M. Official Records Ventura County.

Jul 9—1958 Book 1633 Page 416.
Olivia Montano Recorder $12.40.

/s/ Stephan Riess
/s/ Thelma Riess
(wife of Stephan Riess)

INDIVIDUAL ACKNOWLEDGEMENT

State of California County of Santa Barbara ss.

On this 9th day of July 1958, before me, J. E. Turner, a Notary Public in and for said Santa Barbara County, personally appeared Stephan Riess and Thelma Riess known to me to be the persons whose names are subscribed to the within instrument, and acknowledged that they executed the same.

Witness my hand and official seal.
/s/ J. E. Turner

Notary Public in and for said Santa Barbara County and State. My commission expires October 17, 1959.

Recorded and compared, Olivia Montano, Recorder, by /s/ James A. Amarine Deputy.
(Seal)

EXHIBIT "B".

Dallas, Texas
June 12, 1956

Dr. Stephan Riess
Santa Susana, California

Dear Dr. Riess:

As has been previously suggested to you, I propose that we amend and supplement our Letter Agreement of September 13, 1955 in the following respects:

(a) You and Mrs. Riess shall immediately execute and deliver to me, and I shall accept, a general warranty deed covering the lands referred to in said Letter Agreement as the "water lands," together with all wells, water rights and other improvements and appurtenances thereon, which said lands are described in Exhibit A attached hereto. The monies which I have previously caused to be paid to you, aggregating the sum of $78,000.00, is, and shall be, of course, a credit on the purchase price of said water lands and other properties.

(b) I shall pay, or cause to be paid, to you and Mrs. Riess an additional $25,000.00 in consideration for which you and Mrs. Riess shall execute and deliver to me a general warranty deed covering your homesite and all other lands which you and she, and either of you, own in the area of your homesite and the Simi Valley.

(c) In further consideration of the above mentioned additional $25,000.00 to be paid you for your homesite and other lands, you shall, upon my request, make locations for Well No. 3 adjacent to

the present Wells 1 and 2, and for a well in the McGrath Bowl on the Montgomery lands and for any other well or wells that I may desire within a radius of three (3) miles of said present wells.

(d) Paragraph 2(a) of the aforesaid Letter Agreement shall be stricken in its entirety and all other provisions of the Letter Agreement relating to the interests or undivided profit rights of yourself and Mrs. Riess and Messrs. Len Acton and Guy Mann in the Montgomery lands and in other lands to be acquired by me in the area shall be eliminated and you and Mrs. Riess and Mr. Acton and Mr. Mann shall surrender all of such rights and interests in consideration of the transfer to each of you of 1/12th of the common stock of Simi Valley Development Company.

(e) That portion of Paragraph 2(b) which provides that in certain situation or contingencies you will have a right to receive water at the rate of 20¢ per gallon shall be changed to provide that the rate shall be 20¢ per 1,000 gallons.

(f) If any disagreement shall arise between us relative to the physical ability of the wells on the water lands to produce sufficient quantities of water to service the Montgomery lands and the additional lands, as contemplated in Paragraph 3 of the Letter Agreement, that issue shall be submitted to three (3) arbitrators, one of which shall be selected by you, one by me and the third by the other two arbitrators, and whose decision shall be final.

(g) Paragraph 4 which provides that you shall have a lien and deed of trust to secure the perform-

ance of my obligations under Paragraph 2(b) be eliminated but I shall remain liable for the payment to you as provided by the Letter Agreement, as here amended.

(h) It shall be understood that, under Paragraph 8, I can at any time, at my option, reconvey the water lands to you and be relieved thenceforth of all obligations, if, in my opinion, the wells on the water lands are no longer capable of producing water in quantities sufficient to be commercially profitable to me, or if I deem that their operation is not economically feasible from my standpoint.

(i) Paragraph 5(c) shall be eliminated, but in lieu thereof it shall be understood and agreed that all monies which have been expended and which may hereafter be expended by the Murmanill Corporation, directly or indirectly, in connection with the acquisition by me or by my nominees or assignees of any of the properties referred to in said Letter Agreement, or in connection with any title examination thereof or in connection with the testing and reworking of wells, and including engineers' salaries, fees and expenses, and all monies theretofore and which may hereafter be advanced by the Murmanill Corporation to or for the account of Simi Valley Development Company shall be shown as an "account payable" of Simi Valley Development Company.

If these proposed amendments and supplements are acceptable to you, I agree to cause 1/12th of the common stock of Simi Valley Development Company to be transferred to you and a like amount to Mrs. Riess and to Mr. Acton and to Mr. Mann.

It is my purpose to assign all of my rights in the September 13, 1955 contract and in this amendment to Simi Valley Development Company but it is understood that I shall not be relieved of any of my obligations under said Letter Agreement, as here amended. It is further understood that wherever reference is made to me in said Letter Agreement or in this amendment and supplement, the reference shall also include cover and shall bind and inure to the benefit of the said Simi Valley Development Company and its successors and assigns.

I also agree that if this amendment is accepted, the supplemental letter of September 13, 1955 relative to my right to change the Letter Agreement in such a way as to make the monies received by you take the status of ordinary income rather than that of capital gain shall be cancelled.

Except as hereinabove provided, the Letter Agreement of September 13, 1955 shall stand and is hereby ratified and confirmed.

If the above and foregoing is satisfactory and acceptable to you and Mrs. Riess, and to Mr. Acton and Mr. Mann, it is requested that each of you please sign a copy hereof, having your signature acknowledged, and return the same to me, whereupon this letter shall become and constitute a binding contract between us in accordance with the terms hereof and the provisions hereof immediately effective. This assignment shall be binding upon me and all the parties accepting the same, regardless of the failure or refusal of any other party or parties to accept it.

Yours very truly,

/s/ C. W. Murchison

The above and foregoing is hereby APPROVED and ACCEPTED as of the 18 day of June, 1956.

/s/ Stephan Riess
/s/ Thelma Riess, wife of
Stephan Riess
Len Acton
Guy L. Mann

STATE OF TEXAS, COUNTY OF DALLAS—ss.

On this 18th day of June, 1956, before me, the undersigned, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared STEPHAN RIESS and THELMA RIESS known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that the executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

/s/ Ruth Palmer
Notary Public in and for said
County and State.

STATE OF TEXAS, COUNTY OF DALLAS—ss.

On this 18 day of June, 1956, before me, the undersigned, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared C. W. Murchison, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

/s/ Jeannette R. Williams
Notary Public in and for said
County and State.

Real property in Ventura County, California, described as follows:

Portions of Santa Susana Valley View Tract No. 1 as per map recorded in book 18 pages 1 to 7 inclusive of Maps, Susana Knolls Annex as per Licensed Surveyor's Map filed in book 4 page 68½ of Record of Surveys of Ventura County, and of any unsubdivided portion of the Rancho Simi in book 3 page 7 of Maps lying within an area in the county of Ventura, State of California, described as a whole as follows:

Beginning at the most southerly corner of parcel 3039 as shown on said Licensed Surveyor's Map and being a point on the boundary of the land described in deed to C. J. McGrath and wife, recorded July 11, 1945, in book 724 page 193 of Official Records, thence,

1st: Northeasterly along the southeast lines of parcels 3039-3038 and 3037 of said Susana Knolls Annex to the southeast corner of said parcel 3037; thence,

2nd: Northerly in a direct line to the southwest corner of parcel 3036 as shown on said Licensed Surveyor's Map; thence,

3rd: Easterly along the southerly line of said parcel 3036 to the southeast corner thereof; thence,

4th: Northerly along the easterly lines of parcels 3036 and 3035 of said Susana Knolls Annex to the southeast corner of lot 1055-A of said Santa Susana Valley View Tract No. 1; thence,

5th: Easterly along the southerly line of said lot 1055-A to and along the southerly line of lot 1054 of the tract last referred to to the southeast corner of said lot 1054; thence,

6th: Northerly in a direct line to an angle point on the easterly line of lot 1050 of said Santa Susana Valley View Tract No. 1; thence

7th: Northwesterly to the most northerly corner of said lot 1050; thence,

8th: Southwesterly in a direct line to the most southerly corner of lot 1049 of said Santa Susana Valley View Tract No. 1; thence,

9th: Northwesterly in a direct line to an angle point in the westerly line of lot 1047 of the last referred to tract; thence,

10th: Westerly to the most northerly corner of lot 1060 of said Santa Susana Valley View Tract No. 1; thence,

11th: Westerly along the northerly lines of lots 1060 and 1060B of Santa Susana Valley View Tract No. 1 to the east line of lot 1191 of Santa Susana Knolls No. 1 recorded in book 19 page 16 to 22 inclusive of Maps; thence,

12th: Southerly to the most southerly corner of said lot 1191; thence,

13th: Southwesterly along the southeasterly lines of the tract last referred to to the most southerly corner of lot 1184 of said tract; thence,

14th: Southwesterly in a direct line to the point of beginning.

EXCLUDING and EXCEPTING therefrom the property vested in Dorothy Rowan which is lots 1060 and 1060A of Santa Susana Valley View Tract No. 1, recorded in Book 19, page 16, Miscellaneous Records of Ventura County.

Said reserved and excepted surface real property is described as follows, to wit:

Lots 3009 to 3015, inclusive, and lots 3033 and 3034 of Susana Knolls Annex, as per map recorded in Book 4, page 68½, Records of Surveys, County of Ventura, California.

16051. Recorded at request of Stephan Riess at 15 min. past 1 p.m. Official Records, Ventura County. April 9, 1957.

Book 1501, page 222, John D. Locks, Recorder fees $760 folio 8. 4715 Foothill Road, Santa Barbara.

No. 20679

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STEPHAN RIESS and THELMA McKINNEY RIESS,

Appellants,

vs.

C. W. MURCHISON and SIMI VALLEY DEVELOPMENT COMPANY,

Appellees.

APPELLEES' BRIEF.

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No. 20679

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APPELLEES' BRIEF.

Jurisdictional Statement.

The jurisdiction of the United States District Court was derived from Title 28, United States Code, Section 1331(a)(1), in that there is diversity of citizenship, Appellants being citizens of California and Appellees of Texas and Delaware respectively. The amount in controversy, exclusive of interest and costs, exceeds the sum of ten thousand dollars ($10,000.00).

The complaint [Former C. T. 2-16][1] was filed October 8, 1958. The case was tried on a first amended complaint [Former C. T. 17-53], filed June 17, 1959, and the jurisdictional allegations appear in paragraphs I, II, III, and XVIII. Appellee Murchison filed his answer to the complaint on October 13, 1959 admitting

[1]"Former C. T." refers to the Clerk's Transcript of Record on the prior appeal to this Court, Number 18198.

the existence of diversity of citizenship [Former C. T. 70], and Appellee Simi Valley Development Company ("Simi Valley") filed its answer on January 6, 1960, also admitting diversity [Former C. T. 152]. A third party complaint premised upon an indemnity agreement was filed by Appellee Murchison on January 5, 1960 [Former C. T. 108-149], the allegations of which were admitted by answer filed by Appellee Simi Valley on January 6, 1960 [Former C. T. 150-151].

The jurisdiction of the District Court was further predicated upon the decision of this Court in the former appeal, Number 18198, which on March 17, 1964 reversed the judgment of the lower court and remanded the case "with directions to take such further proceedings as are consistent with the views expressed in this Opinion." 329 F. 2d 635, 644.

The jurisdiction of this Court is believed to derive from Title 28, United States Code, Section 1292(b), in that on April 11, 1966, the District Court declared that the Order in question involved a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation [C. T. 221-222],[2] and on May 11, 1966, this Court permitted an appeal to be taken from such Order.

Statement of the Case.

This is the second appeal taken in this case. It follows from an interlocutory order of the District Court granting Appellees' motions for arbitration and staying proceedings pending arbitration.

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[2]C. T. refers to Clerk's Transcript of Record on this appeal, Number 20679.

In the prior appeal, Number 18198, the operative facts were carefully summarized by this Court and because of their relevancy to the question at hand, we take the liberty of quoting from the Court's Opinion [329 F. 2d at 637-639]:

> "Stephan Riess and Thelma McKinney Riess (referred to herein as the sellers) entered into a contract with C. W. Murchison, who subsequently assigned to Simi Valley Development Company (referred to herein as the buyers) for the sale of certain real estate, namely: A three and one-half acre parcel of land in the Simi Valley in Ventura County, California, on which were located a number of wells (referred to herein as the water lands) and, in addition, approximately three hundred subdivided lots in the same area (referred to herein as the additional lands).
>
> The contract consisted of two separate letters from C. W. Murchison to Stephan Riess, dated September 13, 1955, and June 12, 1956, constituting a single integrated agreement, under which: (1) The sellers were to convey the water lands and the additional lands to the buyers on June 12, 1956, (referred to herein as the consummation date). (2) The buyers were to deliver one-sixth of the common stock of the Simi Valley Development Company to the buyers on the consummation date. (3) The buyers were to pay the sellers $1,000,000 as follows: $50,000 was to be paid on the consummation date. $24,000 was to be paid in each of the two years immediately following the consummation date. No fixed time was set for payment of the balance; it was to be paid at the

rate of ten cents per 1,000 gallons of water produced, saved, and sold from the water lands, provided, however, that if during any year the amount payable at this rate should be less than $24,000, the sellers were to be entitled to take the difference in water at the rate of twenty cents per 1,000 gallons, though if the buyers should elect to pay the difference in money, they might do so. (4) 'Subject to' the physical ability of the water on the water lands to adequately service certain other lands which were owned by the buyers and which were to be developed for residential and commercial uses (referred to herein as the Montgomery lands), the buyers were to build or install a reservoir and pipelines on the water lands to transmit water taken therefrom to the nearest boundaries of the Montgomery lands by June 12, 1958. *In case of a disagreement as to the sufficiency of the water on the water lands to adequately service the Montgomery lands, the question was to be submitted to arbitration.* (5) The buyers were to have the right at any time to reconvey the water lands to the sellers and terminate the contract and their future obligations thereunder, if, in their opinion, the water on the water lands should no longer be capable of producing water in quantities sufficient to be commercially profitable to them.

Pursuant to the contract the sellers conveyed the water lands and the additional lands to the buyers on the consummation date. They have performed all the material covenants and conditions on their side of the contract.

During the fourteen months prior to the consummation date, the buyers paid the sellers $28,000 in fourteen monthly installments of $2,000 each (referred to herein as the voluntary payments). The contract recites that this amount should be a 'credit on the purchase price.' On or about the consummation date, the buyers paid an additional $50,000 to the sellers, and they delivered one-sixth of the common stock of Simi Valley Development Company to the sellers.

During the fifteen months immediately following the consummation date, the buyers paid the sellers $30,000 in fifteen monthly installments of $2,000 each. Thereafter, the buyers refused to make any further monthly payments, contending that the voluntary payments ($28,000) should be credited against the balance due for the last nine months of the first two year period ($18,000), thereby satisfying such balance and creating an overpayment of $10,000.

Subsequently, during certain meetings between the sellers and the buyers, and in certain correspondence and conversations between them, concerning future performance by the buyers under the contract, the buyers expressed some unwillingness to comply exactly with the terms of the contract. Whether the buyers actually repudiated the contract is in dispute.

The buyers did not build or install the reservoir and pipelines on the water lands by June 12, 1958, as promised, though they did build and install them at a later date before trial. They asserted that the water on the water lands was insufficient

to adequately service the Montgomery lands and that, therefore, the condition to their duty to build or install the reservoir and pipelines by that date did not occur.

The buyers have not paid the sellers at the contract rate for water produced, saved, and sold by them from the water lands, though between the consummation date and the date of trial they did produce, save, and sell water therefrom.

The buyers have never exercised their right under the contract to terminate the contract for insufficiency of the water on the water lands.

On October 8, 1958, the sellers brought the present action in the District Court. They demanded a jury trial. At trial they proceeded on the theory that the buyers committed total breach of the contract by failing to perform their duties thereunder and by unequivocally repudiating such duties.

Before and during the trial, the buyers sought to enforce the contract's arbitration clause. They made a number of motions to stay the proceedings pending arbitration of the question of the sufficiency of the water on the water lands to adequately service the Montgomery lands. The District Court denied such motions on the ground that the question of sufficiency was not material to the case." (Emphasis added).

After reciting the above facts, this Court ruled, in part, that the District Court erred in holding the buyers' duty to build or install the reservoir and pipelines by June 12, 1958, was absolute and unconditional regard-

less of the sufficiency of the water. The Court stated at 644:

> "Under our holding above, the sufficiency of the water on the water lands to adequately service the Montgomery lands is quite material to the case. Therefore, *we further hold that the District Court's denial of the buyers' motions for arbitration, on the ground that the question of sufficiency was immaterial, was erroneous.* If *the present case is one which is otherwise proper for arbitration the buyers are entitled to have the question of sufficiency settled by arbitration. Whether it is such a case must be determined on the facts relative to the buyers' conduct.* . . . And the determination must be governed by the pertinent California cases and statutes, for the contract is not one involving commerce . . . and the question relates to performance and discharge and, therefore, under the pertinent authorities is governed by the substantive law of California, the place of performance. . . .
>
> The Judgment is reversed and the case is remanded to the District Court with directions to take such further proceedings as are consistent with the views expressed in this Opinion." (Citations omitted) (Emphasis added).

Pursuant to the above directive and remand, Appellees again requested the trial court to refer the matter to arbitration [See, *e.g.,* Memorandum of June 12, 1964, reproduced in part, C. T. 26-34], and when Appellants filed a third amended complaint [C. T. 2], Appellees moved for a stay [C. T. 22-36]. Hearings followed on March 8, 9, 10, 11, 16, 17, and 23, June 7, 8, and 9,

and November 8, 1965 [R. T. 1-731],[3] concerning the propriety of arbitration, at the conclusion of which the District Court granted Appellees' motion.[4]

The Order, from which this appeal is taken, provides in pertinent part as follows:

> ". . . and it further appearing . . . that defendant and third party plaintiff C. W. MURCHISON, and third party defendant SIMI VALLEY DEVELOPMENT COMPANY, *duly and timely moved the Court for its order staying proceedings* pending arbitration of said issue, and that defendant and third party plaintiff MURCHISON, and third party defendant SIMI VALLEY DEVELOPMENT COMPANY are not, and that *neither of them is, in default or otherwise precluded from proceeding with arbitration*, and that the present case is one which is otherwise proper for arbitration, and the Court having considered all of the records and files of the above entitled cause, the evidence submitted, the memoranda and arguments of counsel, and the Court being fully advised, and good cause appearing therefor, IT IS ORDERED:
>
> 1. That the parties proceed to arbitration of the issues. . . .
>
> * * *
>
> 3. All proceedings in the above entitled cause are stayed pending the decision of the arbitrators." [C. T. 193, line 18, to 194, line 1; 195, lines 2 and 3] (Emphasis added).

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[3]"R. T." refers to Reporter's Transcript of Record on this appeal.

[4]The filing date of October 14, 1965 stamped on the Order [C. T. 192] appears in error, since it was not until November 8, 1965, that the lower court stated it would sign and file the Order [R. T. 729, line 25, to 730, line 2, 731, lines 10-11].

This Order culminated the long-standing efforts on the part of Appellees to obtain arbitration of the dispute in accordance with the terms of the contract. Since the commencement of this action, Appellees have consistently demanded arbitration, and Appellants have opposed it. In this connection, the Court's attention is invited to the numerous requests appearing in just the Clerk's Transcript on the former appeal:

June 30, 1959—Simi Valley moved to dismiss or in the alternative for a stay of the action until Appellants complied with arbitration [Former C. T. 54-55].

August 31, 1959—C. W. Murchison moved for dismissal or stay of the action until Appellants complied with arbitration [Former C. T. 60-63].

October 13, 1959—C. W. Murchison in his answer raised the failure to arbitrate as a defense [Former C. T. 74].

October 26, 1959—C. W. Murchison moved for a stay of the proceedings pending arbitration [Former C. T. 77-78].

January 5, 1960—Both Appellees moved the District Court to reconsider its order denying their motion for a stay pending arbitration [Former C. T. 84-86].

January 6, 1960—Simi Valley in its answer raised the refusal to arbitrate as a defense [Former C. T. 156]

April 14, 1960—Both Appellees in their Memorandum of Contentions of Facts and Law requested that the dispute over water be submitted to arbitration [Former C. T. 184-188].

May 12, 1961—Simi Valley moved for a stay pending arbitration [Former C. T. 201-202].

May 12, 1961—C. W. Murchison moved for a stay pending arbitration [Former C. T. 211-212].

Significantly, Simi Valley had requested arbitration even prior to the commencement of this suit. In its letter of May 19, 1958, Appellee wrote as follows:

"Dear Mr. and Mrs. Riess:

At our meeting on May 14th you requested that I submit in writing a proposal for settling the problems in respect to the Simi Valley properties and the existing contract dated September 13, 1955, as amended by letter of June 12, 1956.

As stated to you at the meeting, Simi Valley Development Co. has made recent tests of wells under the supervision of competent engineers and had been advised that there is inadequate water to justify a development of all the properties covered by the aforesaid agreement. It would be an economical waste in their opinion to build reservoirs and pipelines to all the properties as required by the aforesaid agreement since there would be insufficient water to service the same.

The aforesaid agreements provide that the controversy may be disposed of by *arbitration*. They also provide that Simi Valley Development Co. may quitclaim to you the water lands and wells located thereon, and be relieved of future obligations, with the right to retain the personal property that was acquired from you by bill of sale.

The engineering reports indicate, and we are satisfied, that there is sufficient water to justify the building of reservoirs and pipelines to the commercial property, which is defined as the property lying south of Los Angeles Avenue. The Simi

> Valley Development Co. stands ready, able and willing to install the reservoir and pipelines to that area and the pumping facilities to deliver water to that area. Said installation will be commenced immediately in the event that you are willing to accept such an installation as compliance with the terms of the aforesaid agreement. If you are unwilling to accept the same as compliance, *we are then faced with the alternative of submitting the controversy to arbitration which Simi is willing to do upon receiving advice from you of your rejection and desire to arbitrate the matter and the designation, by you, if an arbitrator, as provided for in the aforesaid agreement.*" (Emphasis added) [C. T. 62; App. Ex. 14].

Appellants found the proposal unacceptable and instead of designating an arbitrator they brought suit in the District Court. There is no evidence in the record below that Appellees ever withdrew their offer to arbitrate nor do Appellants so contend. Appellants likewise do not claim that Appellees failed to assert their right to arbitration in a timely fashion. In this respect, note the following colloquy between the court and counsel for Appellants:

> "The Court: . . . in other words, Mr. Murchison from the very beginning of this case has demanded arbitration. Every time we have a hearing, he demands arbitration. The record is clear that he demands arbitration.
>
> Mr. Schwartz: That's right." [R. T. 558].

At the hearing below on the question of whether Appellees were entitled to arbitration, the following oc-

curred: Hal E. Marron, a water expert, was called as a witness on behalf of Appellees [R. T. 65]. Mr. Marron testified that he could render an expert opinion as to the amount of water necessary to service adequately the Montgomery lands, contemplating that such lands would be developed for residential and industrial usages [R. T. 68]. After explaining how he could arrive at this opinion, Mr. Marron testified that if given sufficient data, he could ascertain the capacity of the wells as of the year 1956 [R. T. 118-119]. This testimony was offered by Appellees in response to the District Court's inquiries as to whether it was possible to determine how much water was both necessary and available [R. T. 41-44, 128-130].

After Marron concluded, Appellant Stephen Riess was called as a witness by Appellants [R. T. 188]. Over Appellees' general objections of materiality, Mr. Reiss testified to such matters as his background in hydrology [R. T. 189], the nature of the land in question [R. T. 191], his development of the water resources on the land [R. T. 192-199], various tests he made on the wells [R. T. 197-198], tests made by Appellees [R. T. 206-209], the output of the wells [See *e.g.,* R. T. 228], the loss of Well No. 1 when the drill broke [R. T. 235-237], the deepening and capping of Well No. 3 by Appellees [R. T. 238-242], the failure of Appellees to complete Well No. 4 [R. T. 249-255], the substitution by Appellees of a 150 h.p. pump for the 350 h.p. pump on Well No. 2 [R. T. 416-419], the method used by Appellees in pumping water from Well No. 2 to certain alfalfa lands [R. T. 483], and various statements allegedly made by Appellees' representatives in 1957 and early 1958 indicating an unwill-

ingness to construct the reservoir or pipelines or develop the property unless Mr. and Mrs. Riess agreed *inter alia* to returning the Simi Valley stock, accepting one-half of the $18,000 in dispute, and limiting the extent of the pipelines [R. T. 311-314, 472-480, 495-496; C. T. 43; Brief for Appellants, pp. 17-19, 22-26].

Based on the above testimony by Mr. Riess, Appellants now claim that Appellees repudiated and abandoned their obligations under the contract and thereby lost their right to arbitration.

No evidence was presented below that Appellees ever refused to arbitrate or declared either the arbitration clause or the contract as a whole to be invalid or unenforceable. Nor was Mr. Riess able to show that he relied upon Appellees' statements to his detriment, or in any way changed his position because of them. In fact after the testimony the trial judge commented:

> "The Court: I know, Mr. Schwartz, but I gave you an opportunity to show there was estoppel. We had Mr. Riess upon the stand and he was on the stand for an entire day, if I recollect, and he didn't testify to anything on which an estoppel could be based. If I would hold there was an estoppel, it would mean the Circuit would reverse it and send it right back.
>
> * * *
>
> You have gone just as far as I want to hear, because Mr. Riess' testimony itself indicates there is no estoppel. He hasn't testified to one thing that Mr. Murchison did that he relied upon." [R. T. 546].

Finally the court concluded that there was no estoppel [R. T. 581].

It should also be observed that at the time the above statements were allegedly made to Mr. Riess, Appellees were claiming the water supply was inadequate and consequently they had no duty to install the reservoir and pipelines. According to Mr. Riess' testimony, Appellees stated they "were not obligated to drill and complete water wells." [C. T. 43]. Mr. Costin told him, "We have a report from engineers that claim there will be only about 300 gallons in a year from now and this is less water than we have got to keep for ourselves to keep the development going." [R. T. 476; See also letter of May 19, 1958, reprinted in part, *supra*].

In Mr. Costin's affidavit of November 5, 1959, he states:

> "It is untrue that no bona fide dispute exists as to the available water; that the controversy existing with the plaintiff is a failure to erect pipelines which the defendant claims they are not obligated under the agreement to do by reason of lack of water to service the entire 1,600 acres, that the available water is only sufficient to serve approximately 200 acres under the Ventura County requirement; that the agreement between plaintiff and defendant, Murchison, does not require partial performance and since there is insufficient water to serve the 1600 acres, there is no obligation on behalf of defendant to erect pipelines to service said acreage." [C. T. 83-84].

At the hearing on arbitration, there was no occasion for Appellees to cross-examine Mr. Riess in regard to the alleged repudiation of the contract by them or to call opposing witnesses, Appellees being of the view that Mr. Riess' testimony was immaterial [R. T. 578-79,

584, 649, 715], and the Court having indicated that it had heard enough [R. T. 546]. Furthermore, Mr. Riess' testimony largely echoed his testimony at the first trial in 1962 [Former R. T. 131-35, 145, 150][5] at which time he was in fact extensively cross-examined by Appellees [Former R. T. 206-52, 273-309, 344-406, 426-47, 456-59].

At the completion of the first trial in this case, the lower court found:

> "At no time, however, prior to or after the date of the consummation of the purchase of the lands from plaintiffs did defendants, or either of them, or anyone acting in their behalf, repudiate said agreement." [Former C. T. 355; see also Former R. T. 255, 418].

The foregoing constitutes generally a statement of the case and the facts relative to arbitration as they were before the District Court when it made its Order on November 8, 1965. We feel constrained at this point, however, because of certain things said in the statement of the case by Appellants, to make some additional comments on the evidence.

Appellants have stated that payment for the land, "except for some preliminary sums, has not yet been made" (Brief for Appellants, p. 3) and that "defendants have had the benefit of plaintiffs' land, without substantial payment." (Brief for Appellants, p. 1). These wholly irrelevant and somewhat inflammatory remarks are clearly incorrect. Under the terms of the

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[5]"Former R. T." refers to Reporter's Transcript of Record on the prior appeal.

contract, Appellees were obligated to pay unconditionally $98,000.00, in addition to turning over one-sixth of the stock of Simi Valley. Not only did Appellees comply with these terms, but paid Appellants an additional $10,000.00. $1,000,000.00 was the contractual ceiling on the cash purchase price and was payable *only* as water was produced, saved and sold. Appellees have always been willing to make such payments [See *e.g.,* Former C. T. 254-55; R. T. 426-27, 512-13]. At the former trial of this case, Appellees went so far as to stipulate for the purpose of that proceeding, that the amount owing was $25,000.00 [Former R. T. 491]. While Appellees were also obligated to supply certain amounts of water to Appellants upon written demand, no such demands have ever been made [Former R. T. 206; R. T. 374, 414-15]. This, however, was the alternative right given to Appellants by the contract, *i.e.,* there was no absolute entitlement to money absent production.

With respect to the so-called "benefits" of Appellants' land, the venture proved to be a bad one for Appellees: the expected water supply was not there and Appellees have had to bear the carrying charges on the land (amounting to $60,000.00 in 1959 alone [See Affidavit of Glen Costin, C. T. 84]).

Appellants seek, as though there were no contract, to convert Appellees' obligation to pay up to $1,000,000.00 as water is produced and sold into an absolute obligation to pay $1,000,000.00 without reference to production. Thus, even though Appellees were not obligated to produce any water, see Point IV *infra,* nor unconditionally to pay any part of the balance, Appellants now claim that because of an alleged breach or repudiation, Appellants are entitled to the entire $1,000,000.00.

Appellants have also asserted in their statement of the case that their evidence showed "repudiation and abandonment of the contract by the defendants." (Brief for Appellants, p. 7). This, of course, is purely argument on the part of Appellants and is controverted by Appellees. The issue has not been tried. See Points II and III, *infra.*

Appellees concur in Appellants' desire to bring this litigation to a close. So that the record is clear, however, we would point out that Appellees have consistently demanded and Appellants have consistently opposed arbitration under the terms of the contract. If arbitration had been held when first requested, we believe this suit would have terminated long ago. The delay is attributable to Appellants' unwillingness to see the controversy resolved in the manner provided in their contract, not because of any delay imposed upon them by Appellees.

Summary of Argument.

Appellants, both at the hearing below and now on appeal, have proceeded upon an erroneous theory of law, namely, that a party who breaches, repudiates or abandons his obligations of performance under a contract thereby forfeits his right to arbitration pursuant to the contract. As demonstrated in Point V *infra,* it is only when the arbitration clause itself is breached, repudiated or abandoned that the benefits of arbitration are lost. In the present case, since Appellees neither refused to arbitrate, abandoned the arbitration clause nor otherwise defaulted in proceeding with arbitration, they are entitled to arbitration, and the decision of the lower court must be affirmed.

We also respectfully submit that Appellants' claims of breach, repudiation and abandonment are premature, inasmuch as the duties which Appellees are claimed to have breached are conditional, as established in the prior decision in this case. Until the condition has been resolved to exist, *i.e.,* whether there is adequate water to service the Montgomery lands, the issue of breach cannot be considered. This argument is explored in Point II *infra.*

In addition, we have contended that assuming arguendo that Appellants' claims were not premature, nevertheless sufficient evidence of repudiation and abandonment was not presented to the lower court, Point III *infra,* and that Appellees were not under an implied duty to develop the water lands and to produce, save and sell water. Such implied duties, as explained in Point IV *infra,* would be contrary to the intent of the parties and the express covenants in the contract.

Specific responses are also directed to Appellants' contentions that the trial court erred in failing to limit the arbitration clause, Point I *infra;* that the District Court erred in failing to make findings of fact, Point VI *infra;* and that the District Court erred in concluding that Appellees were not in default, Point VII *infra.*

ARGUMENT.

I.

The Trial Court Properly Limited the Arbitration Clause.

In the first point of their brief, Appellants state that the arbitration clause of the contract is limited to the sufficiency of water as a prerequisite to Appellees' obligation to build reservoirs and pipelines (Brief for Appellants, pp. 10-14). This statement by Appellants being supported by the obvious wording of the contract, we have no dispute with it. Appellants go on to assert, however (at least in the point-heading), that the trial judge failed so to limit the arbitration clause. Here we must take issue.

No references to the transcript on appeal are made by Appellants in support of their argument, nor do they explain how the lower court erred. While a number of matters are cited in their brief which are not arbitrable, such as Murchison's right to reconvey the lands or whether or not there has been a repudiation, these matters were never referred to arbitration. The attention of the Court is invited to the wording of the Order, the best evidence opposing Appellants' claims:

> "That plaintiff on the one hand, and defendant and third party plaintiff MURCHISON and third party defendant SIMI VALLEY DEVELOPMENT COMPANY jointly on the other, are directed each to proceed to arbitration as soon as reasonably practicable, and to submit to the three arbitrators . . . the issues hereinafter set forth, such arbitrators . . . to render a written decision to the Court and to the parties upon the following two specific issues:

(a) How much water would have been necessary on June 12, 1958, on a continuous basis, to adequately service the lands covered by the Montgomery contract with an adequate supply of water, contemplating that such lands would be developed for residential and industrial usages;

(b) Whether, on June 12, 1958, the well or wells then or thereafter located on the water lands were physically able to produce water, or a continuous basis, in the quantity determined by the arbitrators to have been necessary pursuant to paragraph 2(a) hereof; . . ." [C. T. 194-195].

Thus, it would appear Appellants' statement is totally unsupported by the record below.

Appellants also refer to the fact, both in argument and in their statement of the case, that after the remand from this Court they filed a Third Amended Complaint which was based on "defendants' repudiation of the contract." (Brief for Appellants, pp. 4, 10). But the filing of this Complaint cannot affect Appellees' right to arbitration. Under the mandate of this Court arbitration was required unless waived by Appellees:

"Under our holding above, the sufficiency of the water on the water lands to adequately service the Montgomery lands is quite material to the case. . . . *If* the present case is one which is otherwise proper for arbitration the buyers are entitled to have the question of sufficiency settled by arbitration. Whether it is such a case must be determined on the facts relative to the buyers' conduct. . . .

> The Judgment is reversed and the case is remanded to the District Court with directions to take such further proceedings as are consistent with the views expressed in this Opinion." 329 F. 2d at 644.

Thus, the issues of this case cannot be altered by an amended complaint which is inconsistent with the judgment of this Court.

> See generally, *Jones v. St. Paul Fire & Marine Ins. Co.,* 108 F. 2d 123 (5th Cir. 1939);
>
> 3 Moore, *Federal Practice* ¶15.11, p. 970 (2d ed. 1966).

Arbitration is also required because the amended complaint, like the former ones, alleges as a breach the failure by Appellees to build and install the reservoir and pipelines by June 12, 1958 [C. T. 17]. There can have been no breach unless there was a duty, and whether or not there was a duty is dependent on the outcome of arbitration.

In addition, the fact that the Third Amended Complaint alleges repudiation of the contract does not affect Appellees' right to arbitration. Faced with just such an argument, the New York Court of Appeals answered it as follows:

> "To allow plaintiff to conclusorily frame the issue in terms of breach and repudiation, and thereby avoid arbitration, would render the instant arbitration agreement meaningless." *DeLillo Const. Co. v. Lizza & Sons, Inc.,* 7 N.Y. 2d 102, 164 N.E. 2d 95 (1959).

II.

Appellees Cannot Be Held to Have Repudiated or Abandoned the Contract Unless the Condition to Their Duty of Performance Occurred.

In seeking to overturn the Order below, Appellants are not claiming that Appellees lost their right to arbitration because they failed to assert it before the filing of suit, or failed to plead the arbitration clause as a defense. Indeed, as already noted, the evidence shows beyond question that Appellees promptly, diligently and continuously demanded arbitration. Nor do Appellants claim that the alleged statements made to them by Costin, Cobb, and Adams caused any detrimental reliance or change of position, with the result that Appellees should be estopped to assert the arbirtation clause. Nor did the Court find an estoppel on the facts [R. T. 546]. Rather, it is urged that Appellees as a matter of law repudiated and abandoned the contract, and by such actions lost the benefits of arbitration.

We might note at this juncture that Appellants are referring generally to the repudiation or abandonment of Appellees "obligations" or "performance" under the contract. More specifically, they are referring to such obligations as the construction of pipelines and reservoirs, the drilling and completion of wells, the development of the water lands, and the production and sale of water. By contrast, Appellants are not asserting that at any time Appellees repudiated the "existence" or "validity" of the contract. Compare *Bertero v. Superior Court,* 216 Cal. App. 2d 213, 30 Cal. Rptr. 719 (1963).

As noted later in this brief, Point V *infra,* Appellants have proceeded both in the lower court and now

on appeal upon an unacceptable theory, namely that a party who breaches or repudiates his duties of performance thereby forfeits his rights to arbitration. This is not the law; and unless the repudiation includes the arbitration clause itself, the court must grant arbitration to the repudiating party. Were the law otherwise, provisions for arbitration would invariably be rendered nugatory by the mere assertion of a breach on the part of the party seeking arbitration.

Assuming *arguendo* that Appellants' theory were correct, we respectfully submit that it cannot be applied in the instant case for the duties which Appellees are claimed to have repudiated and abandoned are *conditional,* as established in the prior decision, 329 F. 2d at 643-644. Unless the condition exists, a circumstance the parties left to determination by arbitration by their contract, there can be no repudiation or abandonment. When a condition of liability fails to occur, the liability does not arise.

Thackaberry v. Pennington, 131 Cal. App. 2d 286, 296-297, 280 P. 2d 165 (1955);

Van Norden v. Metson, 75 Cal. App. 2d 595, 598-599, 171 P. 2d 485 (1946);

Mineral Park Land Co. v. Howard, 172 Cal. 289, 15 Pac. 458 (1916);

Restatement of Contracts, §395;

6 Corbin on Contracts, §1252.

In *Thackaberry v. Pennington, supra,* the agreement required payments to be made to the plaintiff and to another, when the latter conveyed ninety lots to a third party. The ninety lots were never conveyed. In holding that the Trial Court had erred in awarding a judg-

ment for the plaintiff, the Court stated as follows at 297:

> "The parties agreed, not that McFadden and plaintiff should be paid in any event or on the conveyance of the 44 lots to Anaheim, but that they should be paid in connection with the construction of houses by Anaheim on the 90 lots. Any obligation to pay plaintiff was conditioned on the conveyance of the 90 lots to Anaheim. Since the condition did not eventuate, the obligation did not accrue."

In *Van Norden v. Metson, supra,* the agreement provided that plaintiff should be entitled to payment after the completion of an arbitration. The arbitration never took place, although the plaintiff did perform services by way of preparation for the proceeding. In holding for the defendant, the Court stated at 598-99:

> "It is elementary that where a payment is agreed to be made on the occurrence of a future event and, through no fault of the promisor, the event does not occur there can be no recovery on the promise." (Citations).

The Restatement of Contracts, volume 2, sections 395, 396, states the rule to be as follows:

> "§395. When Failure of a Condition to Occur Discharges a Duty.
>
> *"A contractual duty is discharged by the unexcused failure of a condition to occur within the time necessary to create a right to the immediate performance of the duty.* Comment:
>
> a. Sections 250-325 (Chapters 10, 11), state the rules governing the requirements for a duty of

immediate performance. A conditional right to performance arises as soon as the contract is made, but the duty does not mature or become one of immediate performance until later. The condition must first occur, and the terms of the contract may require it to occur at a particular time or within a limited period. When a duty is thus conditional, and the seasonable occurrence of the event becomes impossible without excuse, the duty is necessarily discharged." (Emphasis added.)

Professor Corbin's statement of the rule is as follows (6 Corbin on Contracts, §1252):

"§1252. Discharge of Duty by Nonperformance of a Condition.

"When a contractual duty is subject to a condition precedent, whether that condition is express, implied, or constructive, there is no duty of immediate performance and there can be no breach of that contractual duty by mere nonperformance, unless the condition precedent is either performed or excused. If such a condition precedent is neither performed nor excused within the time that is required, such failure now makes it impossible for a breach of contract to occur. Nonperformance of the primary contractual duty can now never operate as a breach of it; and no remedy for enforcement will ever be available. Therefore, the contractual duty must be regarded as discharged."

In *Mineral Park Land Co. v. Howard, supra* at 292, the California Supreme Court noted:

"It is, however, equally well settled that where performance depends upon the existence of a giv-

> en thing, and such existence was assumed as the basis of the agreement, performance is excused to the extent that the thing ceases to exist or turns out to be non-existent."

The duty to install and construct the reservoir and pipelines, under the terms of the agreement, did not come into being unless the wells were physically capable of meeting the contractual requirements. In attempting to argue that a repudiation exists without reference to the condition, Appellants have run headlong against the prior opinion of this Court and the established law of the case.

In the first appeal this Court held, despite Appellants' argument that there had been a repudiation (Former Opening Brief for Appellants, pp. 64-71), that Appellees' duty to build or install the reservoir and pipelines was conditional, not absolute, and whether or not the condition existed was a circumstance to be established before the issue of total breach could be considered. Thus, the conclusion is inescapable that the law of the case is that until the sufficiency of water is determined, by arbitration if it has not been waived, Appellants have no standing to assert a repudiation by Appellees of the obligation to construct reservoirs and pipelines, since absent such sufficiency no such obligation existed.

At this point, Appellants would undoubtedly answer that only the duty to construct the reservoirs and pipelines was conditional not the obligation to develop the land and produce and sell water. And thus, these latter duties could be repudiated without reference to the sufficiency of water. The answer is obvious. No such duties appear in the contract and it is Appellees' position

that they do not exist. See Point IV, *infra.* If such duties could be implied, the sufficiency of water to meet the contractual criteria would necessarily be an implied condition precedent to such implied duties. After all, since Appellees acquired the property for the purpose of supplying water to the Montgomery lands, it is reasonable to assume that if the water supply was inadequate for their needs, Appellees would have neither the obligation to construct a reservoir or pipelines nor the obligation to go forward and develop the property by drilling new wells or improving old wells to produce insufficient quantities of water.

In view of the foregoing, it is respectfully submitted that Appellees cannot have forfeited their right to arbitration by repudiation or abandonment of their duties as argued, since the condition precedent to such duties, if they can be implied, cannot be said to have come into being until the issue of sufficiency has been resolved in the manner in which the parties agreed it should be resolved, *i.e.* by arbitration.

III.

Appellees as a Matter of Law Did Not Repudiate or Abandon Their Obligations Under the Contract.

While we feel that the question of repudiation must of necessity depend on the outcome of arbitration and the determination therein that a duty which could have been repudiated came into being because of the existence of an adequate water supply, see Point II, *supra,* and that only a repudiation of the arbitration clause itself could cause a loss of the contractual right to arbitrate, see Point V, *infra*, we also respectfully submit *arguendo* that sufficient evidence of repudiation and abandonment was not presented to the trial court.

It would be well at this time to review briefly the extent of Appellees' performance under the contract:

1. Appellees were to deliver one-sixth of the common stock of the Simi Valley Development Company to Appellants on the consummation date of the contract. Appellees fully performed this duty.

2. Appellees were obligated to pay $50,000.00 on the consummation date of the contract. This duty was performed.

3. Appellees were to pay at least $48,000.00 in monthly installments of $2,000.00 each for the two-year period following the consummation date. Of this amount Appellees paid $30,000.00, contending that the balance had been satisfied by payments totaling $28,000.00 made to Appellants, before the contract was consummated, without obligation on the part of Appellees. These earlier payments, it was provided, were to be a "credit on the purchase price" of the contract. Under these circumstances, it manifestly appears that Appellee's refusal to make further payments was based on a bona fide dispute and the lower court so found:

> "In this connection, the Court finds that there was a dispute in good faith as to the liability of defendants to pay said last nine monthly installments, the plaintiffs contending that the same were due and unpaid, and defendants contending that they had been paid. The remaining $28,000.00, paid prior to June 20, 1956, were voluntary payments, but, in accordance with said agreement, were to be a credit against the purchase price." [Former C. T. 354].

In the recent hearing below, the court stated:

> ". . . under the present posture of the case I certainly wouldn't feel inclined to hold that the failure to build the reservoir and pipelines was a total repudiation of the contract, and I wouldn't feel inclined to believe that the failure to make the payments of money due was a repudiation of the contract." [R. T. 409].

4. Appellees were to pay the balance of the purchase price at the rate of $.10 per 1,000 gallons of water produced, saved and sold from the Water Lands. According to the record below, no water was produced, saved or sold prior to February 1, 1960 [Affidavit of Glen Costin, Former C. T. 254], and thus it is respectfully submitted that the breach or compliance with this duty should not bear upon Appellees' request for arbitration which preceded that date.

5. Appellees were obligated to construct a reservoir and pipelines, subject to the conditions of adequate water. Appellees did not construct the facilities when required because, as they have consistently asserted, the Water Lands did not contain an adequate water supply. That Appellees' position in this respect has always been taken in good faith is borne out by not only Appellants' own evidence, as noted in our statement of the case, but also by the affidavits on file from Appellees: In Costin's affidavit of November 5, 1959, he sets out many of the tests performed and thereafter states:

> "It is untrue that no bona fide dispute exists as to the available water; that the controversy existing with the plaintiff is a failure to erect pipelines which the defendant claims they are not obligated under the agreement to do by reason of

> lack of water to service the entire 1,600 acres, that the available water is only sufficient to serve approximately 200 acres under the Ventura County requirement; that the agreement between plaintiff and defendant, Murchison, does not require partial performance and since there is insufficient water to serve the 1,600 acres, there is no obligation on behalf of defendant to erect pipelines to service said acreage." [C. T. 83-84].

Please see also the affidavit dated October 18, 1961 [Former C. T. 252-257]. It may further be noted that the fact that the reservoir and pipelines were constructed, although at a time after this suit was commenced, would indicate an overall intention of the part of Appellees to perform the contract rather than to disavow it.

6. Appellees were also obligated to deliver certain quantities of water to Appellants, upon thirty days' written demand, if the amount paid in any one year was less than $24,000.00. No such demand in writing was ever made and Appellees are not in default of this obligation.

The above represents the sum total of Appellees' express obligations under the contract and the extent of their performance. In addition, the evidence on both sides indicates that Appellees did commence drilling operations, expended substantial sums in this connection, and performed numerous tests on the wells—although the amount of Appellees' efforts is in dispute.

It should also be noted that under the contract Appellees had the right to reconvey the Water Lands to Appellants and terminate the contract if in Appellees'

opinion the water on the water lands should no longer be capable of producing water in quantities sufficient to be commercially profitable to them. Appellees never exercised this right to terminate the contract.

In view of the substantial amount of performance under the contract and Appellees' belief that the condition precedent to their duty did not exist, it is clear that the statements made to Mr. Riess, if true, constituted not a repudiation but rather a proposal to enter into another contract. And the lower court was justified in finding at the first trial that Appellees had not repudiated the contract.

While the finding in the former trial of no repudiation might have been "gratuitous" since the issue was properly one for the jury, as the Appellate Court declared in the first appeal, that finding does have application to the instant appeal. Here, the question of repudiation was raised on a motion for arbitration and stay and was for the court, not the jury, to decide.

Furthermore, whether there was repudiation depends entirely on Mr. Riess' credibility, and this is a matter that must lie within the realm of the trial court since it observed the demeanor of the witness on both occasions when he testified and the effect of cross-examination at the first trial.

Based on the foregoing it is respectfully submitted that a holding on the present record that as a matter of law Appellees by their alleged statements to Mr. Riess or their failure to develop the land and sell water repudiated or abandoned the express requirements of the contract would be inappropriate.

IV.

There Is No Implied Duty to Develop the Water Lands and to Produce, Save and Sell Water.

In Point IIB of their brief, Appellants state that the contract in question contemplated the development of the Montgomery lands and that these lands would be supplied with water from the Water Lands. By this statement Appellants apparently mean that Appellees had an implied obligation to develop the water resources, and in failing to do so, they abandoned and breached the contract, thereby losing the right to refer to arbitration the matter of the sufficiency of the water.

Appellants cannot be relying on the doctrine of "frustration of purpose," despite the similar terminology in the point heading. That doctrine furnishes an excuse for non-performance whenever a fortuitous event supervenes to cause a failure of the consideration or a practically total destruction of the expected value of the performance. *Autry v. Republic Productions, Inc.,* 30 Cal. 2d 144, 180 P. 2d 888 (1947).

In support of their position, Appellants cite the case of *Acme Oil & Mining Co. v. Williams,* 140 Cal. 681, 74 Pac. 296 (1903). There the defendant leased certain oil lands to the plaintiff in exchange for the right to royalties. The lease provided that in case of the lessee's default, plaintiff had the right to re-enter the premises and terminate the lease. Because of the failure of the lessee to work the oil wells with reasonable diligence, the lessor thereafter declared a forfeiture and took possession of the premises. In upholding his right, the California Supreme Court found an implied covenant in the contract that if oil were present in paying quantities the oil wells would be diligently operated for

the best advantage and benefit of the lessee and lessor. The court based its reasoning on the following:

> "The *sole consideration* usually moving the lessor in extending oil leases is, and the only consideration for the particular lease involved here was, the royalties the lessor would receive from proper and continuous pumping of oil, after it had been developed in paying quantities. These leases are only valuable on development, and are then only valuable to both parties, to the extent that the product may be secured and disputed of, and *when the only consideration for the lease is the share which the lessor will obtain of what is produced, there is always an implied covenant that diligence will be used toward such production.*
>
> *There are few other mining enterprises where delay is so dangerous, and where diligence in securing immediate possession of the mineral is so necessary as in mining for oil.* As to the precious metals, fixed in the veins which hold them, they remain intact until extracted.
>
> Oil, on the contrary, is of a fluctuating, uncertain, fugitive nature, lies at unknown depths, and the quantity, extent, and trend of its flow are uncertain. It requires but a small surface area, in what is known as an oil district, upon which to commence operations for its discovery. But when a well is developed the oil may be tributary to it for a long distance through the strata which holds it This flow is not inexhaustible, no certain control over it can be exercised, and its actual possession can only be obtained, as against others in the same field, engaged in the same enterprise, by dili-

gent and continuous pumping. It is the property of anybody who can acquire the surface right to bore for it, and when the flow is penetrated, he who operates his well most diligently obtains the greatest benefit, and this advantage is increase in proportion as his neighbor similarly situated neglects his opportunity. Hence it is, that ever since the discovery of petroleum in this country, leases of oil lands, with royalty to the lessor on the product, have contained provisions, not only for the immediate sinking of wells and their number, but for diligent operation after oil has been struck, and where such leases do not contain express provisions to this effect, and the *only consideration* for their execution is the share in the product which the lessor, either in kind, or as a royalty, is to receive, it is necessarily implied, as of the essence of the contract, that the lessee shall work the wells with reasonable dispatch for their mutual advantage." *Id.* at 684-85. (Emphasis added).

It is evident from the foregoing that the *Acme Oil* case is inapplicable to the case at hand. Under the instant contract, Appellants were to receive one-sixth interest in Simi Valley plus $50,000.00 on the consummation date and $24,000.00 in each of the following two years. The balance of the $1,000,000.00 was to be paid at the rate of $.10 per thousand gallons of water produced, saved and sold from the water lands, provided, however, *that if during any year the amount payable at this rate should be less than $24,000.00, the plaintiffs were to be entitled to take the difference in water at the rate of $.20 per one thousand gallons of water.* It is apparent, then, that the *sole* consideration

was not based on the water produced. Appellants were not only guaranteed the stock plus $98,000.00 in cash (which they received plus another $10,000.00), but were entitled to take up to $24,000.00 worth of water each year thereafter during the span of the contract, which they might dispose of as they pleased. It is also apparent that the *Acme* court arrived at its holding because of the abundant evidence of industry custom and usage and the particular quality of oil. There is no comparable evidence in the case at hand.

In addition, there can be no implied covenants in a contract, such as that involved in the present case, which contains express covenants inconsistent with those sought to be implied. Thus, while *Hartman Ranch Co. v. Associated Oil Co.,* 10 Cal. 2d 232, 73 P. 2d 1163 (1937), cited at page 43 of Appellants' brief, also involved an oil lease where the sole consideration was royalties and consequently is inapposite to the facts at hand, at page 239, immediately after the section quoted by Appellants, the court states, "It is agreed, of course, that implied covenants will not be raised which are in conflict with express covenants." In the instant case, the parties expressly decided what remedy would be available to Appellants should Appellees fail to save, produce and sell water. In such event Appellants had the right to take up to $24,000.00 worth of water a year. Consequently, a covenant cannot be implied requiring Appellees to produce, save and sell water, the parties having spelled out Appellants' rights by an ex-

press covenant inconsistent with that sought to be implied.

The cases of *Sauder v. Mid-Continent Petroleum Corp.*, 292 U.S. 272, 54 S. Ct. 671 (1934); and *Rehart v. Klossner,* 48 Cal. App. 2d 40 (1941), cited at page 43 of Appellants' Brief, are also oil lease cases with the sole consideration depending upon oil production, and are likewise inapplicable to the case at hand.

The case of *Lippman v. Sears Roebuck & Co.,* 44 Cal. 2d 136, 280 P. 2d 775 (1955), also relied upon by Appellants at pages 43-44 of their brief is clearly distinguishable. There, the trial court found that the lease provision calling for a minimum monthly rental of $285.00 was intended to be and was, in fact, *a nominal rental and was not a substantial or adequate minimum rental.* By contrast, the present case, because of the substantial size of the guaranteed payments, would be governed by the decisions in *Cousins Inv. Co. v. Hastings Closing Co.,* 45 Cal. App. 2d 141, 113 P. 2d 878 (1941), and *Masciotra v. Harlow,* 105 Cal. App. 2d 376, 233 P. 2d 586 (1951), distinguished in the *Lippman* case. The court in *Lippman* stated as follows, at 142 and 144:

> "The rules which govern implied covenants have been summarized as follows: '(1) the implication must arise from the language used or it must be indispensable to effectuate the intention of the parties; (2) it must appear from the language used that it was so clearly within the contemplation of the parties that they deemed it unnecessary to

express it; (3) implied covenants can only be justified on the grounds of legal necessity; (4) a promise can be implied only where it can be rightfully assumed that it would have been made if attention had been called to it; (5) *there can be no implied covenant where the subject is completely covered by the contract.'*

* * *

In *Cousins Inv. Co. v. Hastings Clothing Co.*. . . . the lessee had occupied the premises for several years under a written lease calling for the payment of a monthly rental of $2,750. The lease was renewed but with the rental increased to $5,500 per month plus taxes. After the lessee had found it difficult to pay that amount of rent, the parties agreed to a revision of the lease to provide for a 'reserved rental' of $4,000 per month plus 5½ per cent of the gross income to be paid in such a manner as to limit the total rent during a six-month period to an average of $5,500 per month. With a little more than a month remaining under the revised lease, the lessee removed to a different location and, for the final month, paid only the minimum rental. The lessor sued for rent upon the theory that after the lessee had impliedly covenanted to remain in business at that location for the full term of the lease, he breached that covenant. The court held there was no such covenant. There was nothing in the nature of the transaction, it concluded, 'to justify a finding that the implied covenant was indispensable to effectuate the intention of the parties, nor can it be supported on the grounds of legal necessity. On the contrary, as defendant argues, it would seem

that the covenant to pay the minimum rental was inserted in the lease as a substitute for an express covenant requiring the continuous operation of the demised premises: that when the rental reserved in a lease is based upon a percentage of the gross receipts of the business, with a substantial, adequate minimum, there is no implied covenant that the lessee will operate its business in the demised premises throughout the term of the lease." (P. 149.)

This conclusion was followed in *Masciotra v. Harlow,* 105 Cal.App.2d 376, 381 [233 P.2d 586]. In that case the defendant leased property for the purpose of operating a restaurant, promising to pay a monthly rental of 7 percent of the gross receipts with a minimum of $250. After several years of successful operation under the name 'Pump Room,' the defendant opened a new restaurant at a different location, transferring the name 'Pump Room' and two-thirds of the personnel to the new location. Defendant continued to operate a restaurant on the old premises, but business fell off and the rentals remained at the minimum. The lessor sued contending that 'there is an implied covenant that lessee would, during the term of the lease, so conduct his business on plaintiff's premises as to make it mutually profitable to both parties.' (P. 379.) The court refused to imply a covenant, concluding that 'the parties considered the stipulated minimum rent to be in itself fair and adequate and any additional sum was in the nature of a bonus which the lessee was willing to pay if his business exceeded his expectations.' (P. 380.)" (Emphasis added).

Finally, in *Kasey v. Molybdenum Corp. of America,* 336 F. 2d 560, 572 (9th Cir. 1964) (dictum), this Court observed, in response to the argument that the purchaser of certain mining property had abandoned and repudiated his agreement by breaching his alleged duty to work the properties from which the sellers were entitled to royalties, as follows:

> "It is far from clear whether there is such a duty on Appellee. Such a duty is often implied, but ordinarily only where the royalty agreement is the sole consideration for the conveyance or lease."
>
> See generally Annot., "Implied Obligation of Purchaser or Lessee to Conduct Search for, or to Develop or Work Premises for, Minerals other than Oil and Gas," 76 A.L.R. 2d 721 (1961).

The above authorities compel the conclusion in this case that a covenant requiring the Appellees to produce, save and sell water should not be implied into the express contract involved herein. Unlike the cases cited by Appellants, Appellants in this case have received a substantial amount of consideration. Furthermore, the parties expressly provided for a minimum yearly payment and gave Appellants the right to take water at the well-head if production did not yield payments in the specified annual amount, thus anticipating the possibility that water would not be produced. Thus there is neither legal necessity to imply a covenant, nor room for its implication.

V.

Since Appellees Did Not Repudiate or Abandon the Agreement to Arbitrate Itself They Are Entitled to Arbitration.

Under the general rule in California and elsewhere a repudiating party forfeits his right to arbitration *only* when the repudiation includes the arbitration clause as well. Otherwise, the agreement to arbitrate stands and must be enforced.

Local 659, I.A.T.S.E. v. Color Corp. of America, 47 Cal. 2d 189, 302 P. 2d 294 (1956) (In bank);

Bertero v. Superior Court, 216 Cal. App. 2d 213, 30 Cal. Rptr. 719 (1963);

Tas-T-Nut Co. v. Continental Nut Co., 125 Cal. App. 2d 351, 270 P. 2d 43 (1954);

Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers Int'l., AFL-CIO, 370 U.S. 254 (1962);

Heyman v. Darwins, Ltd. [1942], A.C. 356 (H.L.);

Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F. 2d 978 (2d Cir. 1942);

In re Pahlberg Petition, 131 F. 2d 968 (2d Cir. 1942);

The Batter Building Materials Co. v. Kirschner, 142 Conn. 1, 110 A. 2d 464 (1954);

6A Corbin, *Contracts,* §1443, pp. 434-43 (1962);

17A C.J.S., *Contracts,* §515(5);

Annot., "Violation or Repudiation of Contract as Affecting Right to Enforce Arbitration Clause Therein," 3 A.L.R. 2d 383 (1949).

The decision of the California Supreme Court in the *I.A.T.S.E.* case, *supra*, bears heavily on this point. There, a dispute arose under a collective bargaining agreement between the defendant corporation and several unions over the rights of various employees to dismissal pay. In accordance with the contract, grievance and arbitration proceedings were commenced between the corporation and all of the unions, except Local 659. That local instead brought an action before the State Labor Commission to recover the alleged dismissal pay. When the defendant asked the union to dismiss the action and arbitrate pursuant to the contract the union repeatedly refused. Finally, defendant informed the union that it would no longer consent to arbitration because of the union's repudiation.

Subsequently, when the arbitration proceedings proved fruitful to the other unions, Local 659 brought an action in the state court asking that the defendant be required to arbitrate the dispute. The trial court dismissed the suit finding that the union was in "default" in proceeding with arbitration because of its unreasonable delay, and because of its repudiation of the arbitration clause and election to proceed before the State Labor Commission. The Supreme Court affirmed.

We take the liberty of quoting the opinion because of its relevancy to the case at hand:

> "The question thus presented is whether or not there has been a waiver, mutual rescission, repudiation, laches, or estoppel by or on behalf of petitioner in the enforcement of the arbitration clause. We are not concerned here with any question involving the repudiation or violation of the terms of the bargaining agreement other than the arbitra-

tion provision. (See conflict of authorities on that subject: 3 A.L.R. 2d 383.) . . .

* * *

Although one party can not by himself 'rescind' a contract, he can wrongfully 'repudiate' it. What is the effect of his repudiation? To answer this, we must first interpret his expressions and determine the coverage of the repudiation. Suppose first that he repudiates the agreement to arbitrate itself. By such a repudiation he does not deprive the other party of his right to arbitration; and if the repudiator brings an action in breach of his valid arbitration agreement the defendant can defend on the ground that arbitration is a condition precedent, or under a statute can obtain a stay or an order to arbitrate, or can counterclaim for damages. But such a repudiator has himself no right to arbitration. The other party can now bring his action in reliance on the repudiation, or otherwise change his position in reliance. Thereafter, the repudiator has no power of retraction and can not insist on the remedy by arbitration. . . .

'In determining whether a repudiation or other vital breach of a contract should deprive a party of his right to an arbitration of the existing dispute, the court should consider the form and extent of the repudiation or breach and the reasons for which it occurred. *A repudiation that clearly includes the arbitration provision itself should prevent the repudiator from using it in defense when sued in the courts. If the provision is not itself repudiated and the issue that is raised by the alleged breach is one that is within the coverage of the provision, the de-*

fendant should be supported in insisting on arbitration of the issue unless his bad faith and wilful misconduct are sufficiently obvious to justify a discretionary refusal of such support.' (Corbin on Contracts, § 1443.) . . ." *Id.* at 194-196 (Emphasis added).

Bertero v. Superior Court, supra, cited by this Court in the previous appeal, also merits close attention. In this case, the plaintiff had been employed by the defendant under a five-year contract which contained an arbitration clause covering all disputes under the contract. After three years of service, defendant's president sent plaintiff a letter stating that the contract was "invalid and unenforceable," and that "in any event the company hereby terminates and cancels such agreement." Thereafter, plaintiff filed suit in the Superior Court for accrued salary and declaratory relief. Defendant moved for an order compelling arbitration. The motion was granted and the proceedings were stayed. The District Court of Appeal reversed, taking the view that defendant *had repudiated the arbitration clause itself.* After quoting substantially the same language from the Corbin treatise as was used in the *I.A.T.S.E.* case, *supra,* the court goes on to state at 221-222:

> "National makes the argument in this court that the March 29 letter meant that Bertero's asserted right to benefits under the contract was invalid but National's right to arbitration was not invalid. National points out that the arbitration clause may be valid and enforceable even though National has a good defense against enforcement of any of the other terms of the agreement. It is a sufficient answer to point out that there is nothing in the let-

ter to qualify it in this manner. When National said 'the agreement' was not enforceable, it was saying that the portion relating to arbitration was not enforceable. When National concluded that it would no longer pay Bertero his salary, National was free to demand arbitration if it then believed that the written agreement to arbitrate had any force or effect. Instead, it wrote the letter of repudiation. Bertero was entitled to consider it a true statement of National's position, and to rely upon it in commencing his own action to enforce the contract. . . .

We are not here concerned with any question involving the repudiation or violation of any of the terms of the contract other than the arbitration clause. For the purpose of this decision it may be assumed (since we need not decide) that National might have, without waiving arbitration, repudiated or otherwise breached every other obligation contained in the agreement. The 1961 statute (Code Civ. Proc., § 1281.2) expressly provides that if an agreement to arbitrate exists, an order to arbitrate will not be refused on the ground that the petitioner's contentions lack substantive merit. The rationale of the rule, as it evolved through case law, is discussed in *Posner v. Grunwald-Marx, Inc.*, 56 Cal.2d 160 [14 Cal.Rptr. 297, 363 P.2d 313]. *Thus it is not because National has repudiated its promise to pay Bertero's salary, but because it has repudiated its promise to arbitrate, that Bertero was justified in resorting to the courts. . . .*

The record before the superior court established as a matter of law that National had waived the right to compel arbitration and that Bertero had

commenced his action in reliance upon that waiver. It was therefore an abuse of discretion for the superior court to stay the action and order the parties to arbitrate." (Emphasis added).

The *Tas-T-Nut* case, *supra,* relied upon by both the *I.A.T.S.E.* and *Bertero* courts, provides additional support for Appellees' position. There, defendant had breached a contract by failing to deliver at the time specified. Thereafter, the plaintiff buyer requested arbitration of the damages in accordance with a clause in the contract. Correspondence ensued, the plaintiff generally insisting on immediate arbitration, and the defendant expressing a reluctance to arbitrate, though not expressly refusing. Finally, plaintiff demanded a statement by defendant by a certain date whether defendant would arbitrate or not. Defendant replied, stating that it felt that arbitration was unwarranted. Later, however, despite this apparent repudiation of the arbitration clause, defendant agreed to arbitration and even insisted upon it before suit was brought by plaintiff.

Notwithstanding defendant's breach of contract and its implied repudiation of the arbitration clause at one point, the Court of Appeals reversed the lower court and held that defendant was entitled to arbitration since its repudiation of the clause had been withdrawn prior to the time that plaintiff elected to bring suit. The court explains at 358:

"The record is clear, therefore, that, even if we assume appellant's somewhat dilatory tactics amounted to an implied repudiation of its obligation to arbitrate, yet there was no election on the part of respondent to accept such conduct as a re-

pudiation and, acceding thereto itself, to abandon its own right to arbitrate until long after appellant had indicated its desire to join in arbitration. . . .

* * *

Election not having been made before that time, the right to elect was gone and so long thereafter as appellant did nothing further justifying a holding that it had again repudiated its obligation to arbitrate the election was not revived.

Where parties have agreed to arbitrate their differences it is the clear intent of the California arbitration statute that courts should enforce the performance of that agreement and when, notwithstanding the agreement, suit has been filed, the statute specially enjoins the court, if the defendant seeks to claim the right to arbitrate, to stay the court action until arbitration has been accomplished, affording in the meantime ample remedies to either party to compel the performance of the mutual obligation of the parties. Says section 1284 of the Code of Civil Procedure:

'If any suit or proceeding be brought upon any issue arising out of an agreement providing for the arbitration thereof, the court in which such suit or proceeding is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration, shall stay the action until an arbitration has been had in accordance with the terms of the agreement: provided, that the applicant for the stay is not in default in proceeding with such arbitration.'

Whatever default in proceeding with arbitration the appellant may have been guilty of in the early

> stages of its controversy with respondent it is clear from the record that well before the action was begun the appellant was the party that was active in the implementation of the arbitration. When, therefore, it applied to the trial court for a stay it was not in default in proceeding with the arbitration and it was error on the part of the trial court to refuse to stay the court action. . . ."

Thus, it would appear that even where the arbitration clause is repudiated specifically, the repudiator does not lose his rights to arbitration if such repudiation is withdrawn before action is taken in reliance upon it.

Additional support for the proposition that only a repudiation of the arbitration clause itself, and not the contract generally, will preclude a party from requiring arbitration is evidenced by the wording of Section 1284 (now superseded) of the California Code of Civil Procedure cited above. That section required a stay of proceedings unless the applicant is "in default in proceeding with such arbitration." This limiting language makes it abundantly clear that it is not any default under the contract that results in a loss of arbitration rights, but rather only a default *in proceeding with arbitration.* The California courts have recognized this view in their interpretation of the related Section 1282 of the Code of Civil Procedure. In *Weiman v. Superior Court,* 51 Cal. 2d 710, 336 P. 2d 489 (1959) the Supreme Court stated at 712-713:

> "Thus the word 'default,' as used throughout the section, obviously refers only to the 'default' of a party in refusing to proceed to arbitration as agreed rather than to a default by a party under the main provisions of the parties' contract. As was said in

> *Pneucrete Corp. v. United States Fid. & Guar. Co.,* 7 Cal.App.2d 733, at page 740 [46 P.2d 1000]: "The Civil Procedure refers to 'the failure to comply with the agreement to arbitrate.'" We therefore conclude that where the parties have admittedly agreed in writing, as in the present case, that "Any disagreement arising out of this contract . . . shall be submitted to arbitration," then the only "default" which need be shown before an order for arbitration may be made under section 1282 is that a 'disagreement' has arisen and that a party has refused to submit such 'disagreement' to arbitration. Any other interpretation of the section would defeat the main purpose of arbitration proceedings, which is to obtain an expeditious hearing and determination by arbitrators of any 'disagreement' which may arise."

Section 1282 of the Code of Civil Procedure, which provides for an original action to compel arbitration as opposed to a stay of existing proceedings, contains language substantially identical to Section 1284. Please note the following:

> "If the finding be that no agreement in writing providing for arbitration was made, or that there is *no default in proceeding thereunder,* the proceeding shall be dismissed. If the finding be that a written provision for arbitration was made and there *is a default in proceeding thereunder,* an order shall be made summarily directing the parties to proceed with the arbitration in accordance with the terms thereof." (Emphasis added).

The Legislature enacted both of these measures together, and it is reasonable to believe that the word "default"

as used in 1282 means the same as it does in Section 1284.

Significantly, the identical language contained in Section 3 of the United States Arbitration Act, Title 9, United States Code, has been limited to defaults in proceeding with arbitration and not defaults under the contract generally.

See:

Kulukundis Shipping Co. v. Amtorg Trading Corp., supra at 989;

Wilson & Co. v. Freemont Cake & Meal Co., 77 F. Supp. 364, 380 (D. Neb. 1948).

The above sections of the California Code of Civil Procedure of course govern the rights of the parties at the time this suit was commenced and the defendants applied for arbitration. Subsequently in 1961, these statutes were re-written. See California Civil Code sections 1281.2-1281.4. The new statute is now framed in terms of "waiver" rather than "default." However, this amendment does not appear to change the recognized principle that the repudiation, default, or waiver must go to the arbitration clause particularly in order for the benefits thereof to be lost.

Lending further support to Appellees' contention herein is the *Drake Bakeries* case *supra,* at 262-63: An employer brought an action for damages due to the alleged violation by the union of a no-strike clause in the contract between the parties. Pursuant to the union's motion, the action was stayed and arbitration ordered. The United States Supreme Court affirmed, despite the

employer's argument that the union must be deemed to have waived or to be estopped from asserting its right to arbitrate. The Court stated:

> "Arbitration provisions, which themselves have not been repudiated, are meant to survive breaches of contract, in many contexts, *even total breach;* and in determining whether one party has so repudiated his promise to arbitrate that the other party is excused the circumstances of the claimed repudiation are critically important." (Citing 6 Corbin, Contracts §1443, pp. 192-193 (1961 Supp.)) (Emphasis added).

Perhaps the leading case on point is the House of Lords decision in *Heyman v. Darwins, Ltd.* [1942] A.C. 356. In holding that an arbitration clause survives the repudiation of a contract and overruling Lord Haldane's decision in *Jureidini v. National British & Irish Miller's Ins. Co.* [1915] A.C. 499, Lord McMillan stated at 373-375:

> "Repudiation, then, in the sense of a refusal by one of the parties to a contract to perform his obligations thereunder, does not of itself abrogate the contract. The contract is not rescinded. It obviously cannot be rescinded by the action of one of the parties alone. But, even if the so-called repudiation is acquiesced in or accepted by the other party, that does not end the contract. The wronged party has still his right of action for damages under the contract which has been broken, and the contract provides the measure of those damages. It is inaccurate to speak in such cases of repudiation of the contract. The contract stands, but one of the parties has declined to fulfill his part of it.

There has been what is called a total breach or a breach going to the root of the contract and this relieves the other party of any further obligation to perform what he for his part has undertaken. Now, in this state of matters, why should it be said that the arbitration clause, if the contract contains one, is no longer operative or effective? A partial breach leaves the arbitration clause effective. Why should a total breach abrogate it? The repudiation being not of the contract but of obligations undertaken by one of the parties, why should it imply a repudiation of the arbitration clause so that it can no longer be invoked for the settlement of disputes arising in consequence of the repudiation?

. . .

I am, accordingly, of opinion that what is commonly called repudiation or total breach of a contract, whether acquiesced in by the other party or not, does not abrogate the contract, thought it may relieve the injured party of the duty of further fulfilling the obligations which he has by the contract undertaken to the repudiating party. The contract is not put out of existence, though all further performance of the obligations undertaken by each party in favour of the other may cease. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract.

There still remains the difficulty raised by the dicta of Lord Shaw and Lord Haldane which I

have quoted. It is said to be wrong to allow a party to a contract who has refused to perform his obligations under it at the same time to insist on the observance of a clause or arbitration embodied in the contract. The doctrine of approbate and reprobate is said to forbid this. I appreciate the apparent dilemma, but with the greatest respect I venture to think it is based on a misapprehension. The key is to be found in the distinction which I have endeavoured to draw between the arbitration clause in a contract and the executive obligations undertaken by each party to the other. I can see nothing shocking or repugnant to law in one business man saying to another that he regrets he finds himself unable to go on with his deliveries under a contract between them and at the same time asking the other to join with him in a reference under an arbitration clause in their contract to ascertain what compensation is to be paid for his default."

Accord:

Woolf v. Collis Removal Service [1948] 1 K.B. 11, 3 A.L.R. 2d 378.

Additional federal authority on point is represented by the opinion of the Court of Appeals for the Second Circuit in the *Pahlberg* case, *supra.* Relying on the House of Lords decision in *Heyman v. Darwins, supra,* and the previous Circuit opinion in *Kulukundis Shipping Co., supra,* the Court upheld the granting of a petition for arbitration pursuant to the terms of a charter party even though the petitioner had repudiated the contract by failing to deliver the steamship within the time permitted.

See also:

Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F. 2d 402, 410 (2d Cir. 1959).

In the *Kirschner* case, *supra,* 110 A. 2d at 469-470, the Court of Errors and Appeals of Connecticut stated:

> "The modern British view seems to us to be sound. It rests on the proposition that what is commonly called repudiation or total breach of contract, whether acquiesced in by the other party or not, does not abrogate the contract, though it may relieve the injured party from further fulfillment of his contractual obligations. . . . Heyman v. Darwins, Ltd., supra, 374. The tendency of late federal decisions appears to foreshadow or to accept the modern British view. In re Pahlberg Petition, 2 Cir., 131 F.2d 968, 970; Kulukundis Shipping Co. v. Amtorg Trading Corporation, 2 Cir., 126 F. 2d 978, 989. . . .
>
> A similar trend is indicated in New York. Matter of Lipman (Haeuser Shellac Co.), 289 N.Y. 76, 79, 43 N.E.2d 817, 142 A.L.R. 1088; see note, 3 A.L.R.2d 383, 424 et seq. We add our approval to the British doctrine so far as it pertains to contracts providing for arbitration of disputes which involve something more than the determination of an appraisal or the setting of a value. 6 Corbin, Contracts, p. 758;"

In light of the above authorities, it is apparent that Appellants are quite wrong when they say, "The law is clear that a party to a contract who repudiates it, cannot claim the benefit of a provision of the contract allowing arbitration." (Brief for Appellants, p. 30). In

fact, their own authorities do not support them. The *I.A.T.S.E.* and *Bertero* cases, cited on page 34 of Appellants' Brief, are described above and clearly stand for the proposition that the repudiation must equate to the arbitration clause itself in order for those benefits to be lost. Similarly, the case of *Grunwald-Marx, Inc. v. Los Angeles Joint Board,* 192 Cal. App. 2d 268, 13 Cal. Rptr. 446 (1961), fails to support Appellants' proposition. In this case, a union was held to have waived its right to arbitration not because of a repudiation of the contract, but rather because the union unequivocally repudiated the arbitration clause by refusing to arbitrate upon the employer's request.

The two quotations from Professor Corbin's 1951 treatise, cited on pages 30 and 31 of Appellants' Brief, and the quote from *Corpus Juris Secundum* on page 32, do not pertain to the right of a party to arbitration who has repudiated the contract. Indeed, when dealing with this particular issue Professor Corbin clearly indicates that arbitration is lost only when the arbitration clause itself is repudiated. See 6A Corbin, *Contracts* §1443, pp. 434-443 (1962), and also 17A C.J.S., *Contracts,* §515(5).

Similarly, the cases of *Caughlin v. Blair,* 41 Cal. 2d 587, 262 P. 2d 305 (1953); *Gold Mining & Water Co. v. Swinerton,* 23 Cal. 2d 19, 142 P. 2d 22 (1943); *American Type Founders' Co. v. Packer,* 130 Cal. 459, 62 Pac. 744 (1900); *Clarke Contracting Co. v. City of New York,* 229 N.Y. 413, 128 N.E. 241; and *Helger Corp. v. Warner's Features,* 222 N.Y. 449, 119 N.E. 113, cited at pages 32 and 34 of Appellants' Brief, while involving questions of repudiation and breach, do not discuss the effect of such actions upon an arbitra-

tion clause, and thus are inapplicable to the question at hand.

In the case at hand, Appellees have never at any time expressly or impliedly refused to proceed with arbitration. Quite to the contrary, since this action was instituted, Appellees have requested arbitration at every step of the proceeding, and the record below is replete with such motions. Furthermore, before the filing of this suit and at the time when the dispute between the parties regarding adequacy of the water first arose, Appellees requested arbitration. These requests were not at any time retracted. In this respect, Appellees are in much the same position as the defendant in *Squire's Department Store, Inc. v. Dudum,* 115 Cal. App. 2d 320, 327-328, 252 P. 2d 418 (1953):

> "He made timely application for arbitration when he filed the second action. He made timely application for a stay in the first action. He never disavowed his insistence upon arbitration or relinquished his right thereto. Whenever pleading to the complaint in the first action, he included a plea of the arbitration agreement in bar or as a stay of the court action. He was, therefore, *not in default in proceeding with such arbitration.*"

Manifestly then, Appellants have neither repudiated nor abandoned the arbitration clause. Nor have they like the defendant in the *Bertero* case, *supra,* denied the validity or enforceability of the contract and thereby implicitly repudiated the arbitration clause.

The general rule allowing arbitration to a party who has allegedly breached or repudiated the contract but not the arbitration clause is a sound one. By reason of this rule, the trial court need only determine, on a motion

for stay, whether the moving party has been in default in proceeding with arbitration by refusal to arbitrate, or by unreasonable delay in asserting arbitration, or by failing to plead the provision as a defense, etc. If there has been no such default or waiver the court's inquiry is over and the dispute must be resolved by arbitration. By contrast, a rule conditioning one party's right to arbitration on his lack of breach or repudiation of his contractual duties would be totally unworkable. Under such a rule, whenever one party to a contract sought arbitration of a dispute, the other could oppose on the grounds that the former had breached, repudiated, or abandoned the contract. The court would then have to try the very issue left for arbitration in order to determine first whether arbitration was permitted or not. If the court found no breach, the issue would then go to arbitration and have to be determined all over again. Mr. Pickwick to the contrary notwithstanding, the law is not an ass.

It should also be noted that California state policy favors arbitration. In *Grunwald-Marx, Inc. v. Los Angeles Joint Board, supra,* at 276-277, the court stated:

> "It has long been the policy in California to recognize and give the utmost effect to arbitration agreements. As stated in *Utah Construction Co. v. Western Pacific Ry. Co.,* 174 Cal. 156, 159 [162 P. 631]: 'The policy of the law in recognizing arbitration agreements and in providing by statute for their enforcement is to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing . . . Therefore every reasonable intendment will be indulged to give effect to such proceedings.' "

We would further respectfully submit that arbitration is especially appropriate to the case at hand where the issue in dispute calls for technical analysis and expert opinion and can more knowledgeably and efficiently be handled by arbitrators who are experienced in the field. That the parties recognized this circumstance at the time they contracted is, doubtless, the genesis of the arbitration provision.

We finally noe that the cases of *Banks v. Calstar Petroleum Co.,* 82 Cal. App. 2d 789, 187 P. 2d 127 (1947), and *Hanes v. Coffee,* 212 Cal. 777, 300 Pac. 963 (1931), cited on pages 55 and 56 of Appellants' Brief, fail to support Appellants' position. In the *Banks* case, the lessee of an oil and gas lease argued that it was error not to refer the issues of abandonment and damages to arbitration in accordance with an arbitration clause in the lease. Holding contrary to the lessee, the court noted that during the four years prior to suit, the lessee had not produced any oil from the property, had in fact capped the well, and had given notice of intention to abandon the lease to the Division of Oil and Gas of the State of California. *These actions constituted a complete abandonment as a matter of law and thus there was no issue for arbitration.* The court further stated at 793:

> "Moreover, at the trial of the action appellant relinquished any claim that it might have had to arbitration of the question of damages alleged to have been suffered by respondents by reason of appellant's occupancy of the property, and practically gave its consent to a judgment of abandonment and for damages."

In the case at bar, Appellees have not as a matter of law abandoned the contract. Furthermore, the question

for arbitration is not abandonment but rather sufficiency of the water supply, and Appellees have never conceded this issue.

In *Hanes v. Coffee, supra,* the issue in controversy was whether the lease ever became operative and this was held not to be a proper subject for arbitration. By contrast, the dispute in the instant case centers around the very issue agreed to be arbitrated, namely, the adequacy of water on the Water Lands.

In view of the foregoing, we respectfully submit that since Appellees neither refused to arbitrate nor abandoned the arbitration clause, nor are otherwise in default in proceeding with arbitration, they are entitled to it, and the decision of the lower court must be affirmed.

VI.

The Order Is Not Defective for Failure to Set Forth Findings of Fact.

In response to Appellants' argument in Point III of their Opening Brief, we respectfully submit that the form of the order in question is proper for the following reasons:

First, the trial judge was under no obligation, we believe, to make findings of fact. Rule 52(a) of the Federal Rules of Civil Procedure specifically limits that obligation as follows:

> "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall sim-

> ilarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. . . . Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 *or any other motion* except as provided in Rule 41(b) [Motion for Involuntary Dismissal]." (Emphasis added).

The instant order is based on a *motion* to compel arbitration and stay of proceedings, and it would seem quite clear under the language of the Rule that no findings are required.

Despite the express mandate of Rule 52(a), however, the case of *Carey v. Carter,* 344 F. 2d 567 (D.C. Cir. 1965), cited by Appellants, reaches a contrary result. This case to our knowledge represents the only decision on the issue at hand and we believe it is wrong.

The *Carey* case cites as authority the Supreme Court's opinion in *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U.S. 449 (1935). There, in a breach of contract action, the trial court had denied a motion by the defendant to require arbitration and stay all further proceedings. The defendant's right to appeal the interlocutory order was sustained by the Supreme Court which treated the denial of the stay as the denial of an injunction.

Subsequent cases, however, have refused to expand the reasoning of the *Shankeroke* case beyond its facts and have instead limited the decision severely. For example, it is now held that where the original action sought to be stayed is equitable rather than legal, the *Shanferoke* rule does not apply. *Baltimore Contractors v. Bodinger,* 348 U.S. 176 (1955); *Alexander v. Pa-*

cific Maritime Assoc., 332 F. 2d 266 (9th Cir. 1964). In the *Baltimore* case, the Court observed:

> " 'Many interlocutory orders are equally important, and may determine the outcome of the litigation, but they are not for that reason converted into injunctions.' "

Similarly, a year after *Shanferoke,* the Supreme Court refused to apply the doctrine in cases involving admiralty. *Schoenamsgruber v. Hamburg American Line,* 294 U.S. 454 (1935). The court distinguished *Shanferoke* as follows:

> "That decision was based on the Enelow Case. Each of these was an action at law in which the defendant by answer sought equitable relief. In each the order held appealable stayed proceedings on the law side and operated as an injunction, within the meaning of that section, against proceedings in another court. The cases now before us are in admiralty. The orders appealed from merely stay action in the court pending arbitration and filing of the award. As shown by the Enelow Case, they are not interlocutory injunctions within the meaning of section 129. And plainly, so far as concerns appealability, they are not to be distinguished from an order postponing trial of an action at law to await the report of an auditor." *Id.* at 456-457.
>
> Accord: *Moran Towing and Transportation Co. v. U. S.,* 290 F. 2d 660 (2d Cir. 1961).

In *American Airlines, Inc. v. Forman,* 204 F. 2d 230 (3rd Cir. 1953), the court refused to treat the denial of a motion to dismiss the complaint as the de-

nial of an injunction under the *Shanferoke* theory. The court stated at 231:

> "Moreover, the vitality of the Enelow and Ettelson doctrine is now at least gravely impaired by City of Morgantown, W. Va. v. Royal Insurance Co. . . . Whether the impairment is fatal the majority of the Supreme Court did not decide, and we shall not anticipate that decision. But we do think the manifest attitude of the Supreme Court in Morgantown is such that Enelow and Ettelson should be restricted to cases clearly within their purview. They should not be substantially extended as appellants' position would require here."

See also, *New York, N.H.&H. R.R. Co. v. Lehigh & N.E. R.R. Co.,* 287 F. 2d 678 (2d Cir. 1961), where the Court of Appeals refused to treat as a denial of an injunction the trial court's denial of a stay pending a determination by the Interstate Commerce Commission; and *Day v. Pennsylvania R.R. Co.,* 243 F. 2d 485 (3d Cir. 1957) where the court refused to treat as an injunction the staying of all proceedings pending a decision on related cases by the National Railroad Adjustment Board.

Manifestly then, the holding in *Carey v. Carter, supra,* opposes both the express language of Rule 52 and the weight of judicial authority. And as illustrated by the above cases, its logical effect is to convert every decision denying or granting a motion which would in any way stay the proceedings (*e.g.*, a reference to a master) into the denying or granting of an interlocutory injunction. Such a result, we submit, would be in complete derogation of Rule 52.

Secondly, since the material facts are not in dispute, findings were unnecessary. The evidence is uncontradicted that at no time did Appellees refuse to arbitrate, repudiate the arbitration clause specifically, deny the validity of the contract, or in any other way default in proceeding with arbitration. There being no conflict on these points, findings are neither useful nor necessary. As this Court has noted in *Yanish v. Barber,* 232 F. 2d 939, 947 (9th Cir. 1956):

> "But not every case, where there is a failure to make findings must be sent back to the district court. 'The fact that the district judge made no findings and announced no conclusions upon this issue, does not require remand, since the record is complete'. . . .
>
> Moore's Federal Practice (2d Ed.) Vol. 5, states at p. 2662, 'The failure of the trial court to comply with Rule 52, while characterized as a dereliction of duty does not demand a reversal "if a full understanding of the question presented may be had without the aid of separate findings,"' quoting from Shellman v. Shellman, 1938, 68 App.D.C. 197, 95 F.2d 108, 109, and citing cases.
>
> A recognized exception to the general rule, requiring a case to be sent back for lack of findings, is where '* * * the record considered as a whole does not present a genuine issue as to any material fact * * *' . . . So when the facts are undisputed, though no finding is made, the case need not be remanded. . . .
>
> 'In the review of judicial proceedings the rule is well settled that, if the decision below is correct, it must be affirmed, although the lower court re-

lied upon a wrong ground or gave a wrong reason.' " (Citations omitted).

Accord, *Graham v. United States,* 243 F. 2d 919, 923 (9th Cir. 1957);

Urbain v. Knapp Brothers Manufacturing Co., 217 F. 2d 810, 816 (6th Cir. 1954) (Injunction).

Furthermore, since the issue of total breach must await the determination of the sufficiency of water, it would have been premature and even error on the part of the trial court to have found whether or not Appellees had repudiated or abandoned the contract.

Thirdly, the District Court did make sufficient findings of fact. In its Order, the court stated:

> ". . . that defendant and third party plaintiff C. W. MURCHISON, and third party defendant SIMI VALLEY DEVELOPMENT COMPANY, duly and timely move the Court for its order staying proceedings pending arbitration of said issue . . . and that neither of them is, in default or otherwise precluded from proceeding with arbitration, and that the present case is one which is otherwise proper for arbitration. . . ."

We submit that the above finding fulfills the test set forth by the advisory committee to the Federal Rules of Civil Procedure:

> ". . . the judge need only make brief, definite, pertinent findings and conclusions upon the contested matter; there is no necessity for over-elaboration of detail or particularization of facts." Reprinted in 5 Moore, *Federal Practice* Par. 52.01, p. 2606 (2d ed. 1966).

Moreover, even if the issue of repudiation generally were material to this appeal, an appropriate finding has already been made by the trial court in the former trial where substantially the same evidence was introduced. The court stated there:

> "At no time, however, prior to or after the date of the consummation of the purchase of the lands from plaintiffs did defendants, or either of them, or anyone acting in their behalf, repudiate said agreement." [Former C. T. 355; See also former R. T. 255, 418].

VII.

The District Court Did Not Err in Concluding That the Defendants Were Not in Default.

Appellants' final attack on the order below is obviously based on a misapprehension by them of the District Court's conclusion. When the court concluded that neither Appellee was in default, the court was not referring to the performance or non-performance by Appellees of their contractual duties. Rather, the court was referring to the manner in which Appellees had proceeded with arbitration. This is clearly indicated by the full wording of the order:

> "Defendant and third party plaintiff MURCHISON and third party defendant SIMI VALLEY DEVELOPMENT COMPANY are not, and that neither of them is, in default or otherwise precluded *from proceeding with arbitration.* . . ." (Emphasis added).

This language is obviously based on the statutory criteria which requires arbitration when "the applicant for the stay is not in default in proceeding with such arbitration." Calif. Code of Civ. Proc. §1284 (before 1961 amendment).

Thus, it is respectfully submitted, the order was proper.

Conclusion.

For the reasons hereinabove set forth, the Order appealed from should be affirmed.

Respectfully submitted,

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STUART L. KADISON,
BURT S. PINES,
Attorneys for Appellees.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

STUART L. KADISON

No. 20679

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STEPHAN RIESS and THELMA MCKINNEY RIESS,
Appellants,

vs.

C. W. MURCHISON, SIMI VALLEY DEVELOPMENT COMPANY, *et al.*,
Appellees.

APPELLANTS' REPLY BRIEF.

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TABLE OF AUTHORITIES CITED

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Appellees.

APPELLANTS' REPLY BRIEF.

Preliminary.

In its earlier opinion in this case (329 F. 2d 635, 644), this court held that Appellees' right to arbitration was to be determined by California law.

> "*If* the present case is one which is otherwise proper for arbitration the buyers are entitled to have the question of sufficiency settled by arbitration. Whether it is such a case must be determined on the facts relative to the buyers' conduct. See Calif. Code Civ. Proc., Sec. 1281; *Bertero v. Superior Court,* 216 ACA 251, 30 Cal. 719 (1963); *Jordan v. Friedman,* 72 Cal. App. 2d 726, 165 P. 2d 728 (1946). And the determination *must be governed by the pertinent California cases* and statutes, for the contract is not one involving commerce . . . and the question relates to performance and discharge and, therefore, under

the pertinent authorities is governed by the substantive law of California, the place of performance."

No California decision holds that a provision for arbitration survives a repudiation of the contract. As will be shown hereafter, the California decisions, including *Bertero v. Superior Court,* 216 Cal. App. 251, hold that provisions for arbitration are repudiated by a party's repudiation of the contract as a whole. It is true that an English decision, expressly at odds with earlier cases, and dealing with a most broad arbitration clause, holds that the arbitration clause survived a total breach of other provisions; but the opinions of all of the Lord's Justice show that their decision is based, at least in part, on the scope of the particular arbitration clause. California has not followed the English decision.

The court's attention is respectfully directed to Appellee's agreement with Appellants' contention that the provision for arbitration applies only to determining "the sufficiency of the water as a prerequisite to Appellees' obligation to build reservoirs and pipe lines" (Appellee's Br. p. 19). The effect of this limited arbitration clause is, then, that other breaches, including the repudiation of the entire contract, need not be arbitrated in any event, but would remain for determination by a court. It therefore appears most practical that the question of repudiation be determined first. Otherwise, the parties would be required to go through the arbitration concerning the quantity of the water, and thereafter to try the question of repudiation which, if decided in favor of Appellants, would render the arbitration useless. Furthermore, the value of the re-

quested arbitration is doubtful at best, because the consequences of the past delay in building the reservoirs and extending pipe lines is relatively minute when compared to the gross breaches and repudiations by Appellees.

Amplification of Appellees' Statement of the Case.

The attention of the court is respectfully directed to its holding, in the former appeal, that the District Court was in error in concluding that the contract in question was not susceptible of total breach. The breach in paying installments adjudicated by the District Court and affirmed by this court was determined without arbitration. The existence of these breaches is also relevant to the question of repudiation.

We think it important to note that in its earlier opinion the court indicated that the rationale of the decision in *Gold Mining and Water Co. v. Swinerton,* 23 Cal. 2d 19 (1943), was applicable to the contract in the present case, although the court noted that the facts in the present case did not make the seller *totally* dependent on the buyer's diligence.

From the reasoning of the court in reaching its conclusion on the earlier appeal, as well as from the conclusion itself, we urge that the contract implied an obligation to exercise diligence in developing the water lands.

At no place in Appellees' brief do they concede that under any circumstances whatever, and regardless of what an arbitration may determine, Appellees are under an obligation to produce water. Their position has been just the contrary. They have contended that while a determination in arbitration could result in the im-

position on Appellees of the obligation to build reservoirs and pipe lines, still, no matter what amount of water was found, Appellees would not be obligated to produce water.

Following is from the transcript of the hearing on the motion for arbitration:

> "The Court: Let's assume for the purpose of argument only that the water lands were not sufficient, the wells on the water lands were not sufficient to produce sufficient water to adequately service the entire 1600 acres.
>
> Then let's assume that the water produced from the wells on the water lands could have adequately serviced 500 acres, or 100 acres.
>
> Then your position is that you were not even obligated to take the water that was available even though it was available to service 100 or 500 acres of land.
>
> "Mr. Kadison: That is our position up to the point of where the difference becomes de minimis. As a matter of fact, no, not up to any point. It wouldn't have made any difference, perhaps this will focus our position, your Honor, as I read the contract, it wouldn't have made an iota of difference if the water lands had been capable of serving all 1600 acres, we would not have been obliged to pump a gallon of water. We could not have relied upon their insufficiency as an excuse for not building the pipelines and reservoir.
>
> "The Court: Let's forget the pipelines and reservoir.
>
> "Mr. Kadison: But we would not under this agreement, we are not obliged to take a single gallon of water whatever they would produce."

If Appellees meant what their counsel said, then the requested arbitration would at most have resulted in determining that Appellees were obligated to do what they have already done (though late), that is, extend pipe lines and build reservoirs, and could presumably result in an award of nominal damages; we say "nominal damages" because the reservoir and pipe lines would be of no benefit to Appellants unless water were produced. But, so Appellees maintain, they were not required to produce water.

We urge the court to hold that the request for arbitration was a comparatively meaningless procedure, *unless* Appellees should concede what until now they have stoutly denied, that Appellees were under an implied duty to develop the water lands for the mutual benefit of the contracting parties or, failing that concession, that this court should so hold.

If Appellants do not have the opportunity to benefit by the arbitration, but are still to be left to the discretionary impulses of Appellees concerning the production of water, then the arbitration and the litigation surrounding it have been a costly and enduring exercise in futility. We believe that this court will not tolerate such proceedings.

We call the court's attention to paragraph 2(b) of the 1955 agreement (Appendix, Appellants' Op. Br. pp. 4-5) dealing with the Appellees' minimum obligations after the first two years. This language, we submit, imposes a minimum obligation on Appellees to deliver money or specific quantities of water each year. We contend that this minimum is not a substitute for the obligation diligently to develop. At this point it is sufficient to say that Appellees' contention that it is

under no obligation to produce water is manifestly at odds with the contract.

We make the foregoing observation without intending to diminish our contention that Appellees have in fact repudiated the entire contract, and that the arbitration clause did not survive the repudiation.

Summary of Closing Argument.

Appellees' right to arbitration is governed by California law; under California law, provisions for arbitration are repudiated by a repudiation of the contract as a whole; at least the repudiating party may not require arbitration.

Contracts which measure royalty, price, or rent by the production of water are subject to the same logic as are similar contracts for the production of oil or gas; there is an implied covenant diligently to develop. Water is "fugaceous", not fixed in the land, as are solid minerals.

Because the payment of the purchase price depended upon the production of water, and Appellees had control of the wells, they were under an implied duty to develop the water lands.

Appellees stated to Appellant Riess that Riess would never get any water. No demand, written or otherwise, was therefore necessary.

Other subsidiary points on the appeal, the lack of Findings, and the form of the Order, will be dealt with briefly.

ARGUMENT.

I.

The District Court Properly Allowed the Amended Complaint to Be Filed; in Any Event, the Issue of Repudiation Was Necessarily Before the Court.

Appellees say that the issues of this case cannot be altered by an Amended Complaint which, they say, is inconsistent with the Judgment; by implication they contend that the allegations of defendant's repudiation should be ignored.

Appellees' statement, if correct, would fix the issues in a case once there had been a remand from an appeal. The statement is unfounded.

Only one decision is cited by Appellees as support for their statement, *Jones v. St. Paul Fire etc. Co.*, 108 F. 2d 123 (5th Cir., 1939). On the second appeal the Circuit Court discussed the propriety of filing an Amended Complaint and said:

> "If the judge had treated the amendment, duly served under Rule 5(a), as allowed, he might have considered the merits . . . His recognition of a right to amend so as to introduce such an issue was correct". (At pp. 124-125).

In the present case, this court on the previous appeal had said that while it reversed the District Court's holding that the contract was not subject to total breach, it refrained from so holding, rightly, because the issue had been excluded by the District Court. On remand, the way was open for plaintiffs to introduce the issue of repudiation.

3 Moore's Federal Practice, Par. 15.11, page 970, which is cited by Appellees, does not help Appellees' contention. Moore says: "Unless the appellate court's adjudication *precludes* amendment . . ., the grant or denial of an amendment is within the sound discretion of the District Court." (*Id.*, p. 971).

But in any event the question of plaintiff's right to file the Amended Complaint is not determinative of the question whether the issue of repudiation was before the District Court. The opinion in the former appeal held that the District Court's denial of arbitration "on the ground that the question of insufficiency *was immaterial* was erroneous". The court went on, however, to state the criteria for determining whether the defendants could have arbitration, referring to the *Bertero* case and to waiver and estoppel.

When defendants moved for arbitration, the plaintiffs filed an affidavit in opposition and alleged the facts which constituted repudiation [Clk. Tr. p. 37 *et seq.*]. Thus the issue of repudiation was unavoidably before the court as opposition to defendants' motion. The District Court, not content with the affidavits, took evidence. Significant portions of the affidavit and of the testimony given are set out in Appellants' Opening Brief at pages 17-20, and at pages 45-54.

Under California law, that evidence was most critical, and its not having been denied should be, we submit, dispositive of this appeal.

II.

The Arbitration Provision Applied Only to the Sufficiency of Water as a Prerequisite to Appellees' Obligation to Erect Reservoirs and Extend Pipe Lines; Other Provisions of the Contract Are Not Subject to Arbitration, and Are Not Conditional.

Appellees agree that arbitration is available only to determine the sufficiency of water as a prerequisite to Appellees' obligation to erect reservoirs and extend pipe lines (Appellees' Br. p. 19).

A scrupulous examination of the contract shows that no other provision is conditional; this is true of the implied duty to develop the water lands. In any event, Appellees have made it abundantly clear that they have no intention of performing any of their obligations whatever, at least until Appellants are willing to give up their stock interest in Simi Valley Development Company, and unless Appellants were willing to accept one-half of the sums due them for the preliminary installment payments.

To argue, as Appellees do, that plaintiffs were required to prove that there was sufficient water before there arose an obligation to develop the water lands is illogical and impractical. Defendants were in possession of the land; only they had the right to drill and develop, not plaintiffs; the very purpose of the transactions between plaintiffs and defendants was that defendants would develop the wells for the ultimate purpose of developing certain other lands for residential and industrial uses. The implied obligation to develop, we contend, is not conditional, but is unconditional so long as defendants retain the lands. Certainly, it

would be unjust and bordering on the absurd to impose on plaintiffs the burden of proving the existence of sufficient water before the defendants should be required to develop the water lands.

The obligation to develop is not to be determined by arbitration. The parties to this appeal are agreed that, under the contract, only the sufficiency of water as a prerequisite to the obligation to construct reservoirs and to extend pipe lines, is to be determined by arbitration, assuming, contrary to our contention, that the contract has not been repudiated.

The sufficiency of the water as a prerequisite to building the reservoirs and extending the pipe lines should be tested only after diligent development of the water lands. Otherwise, testing of the quantity of the water could be unfair and could wrongly divest the plaintiffs of the right to payment of the balance of the purchase price.

III.
The Undenied Evidence Shows Repudiation of the Contract.

Appellees profess to show that they have not repudiated the contract. This they do (at pp. 27-31 of their Brief) by listing a number of obligations which Appellees imply are all of their obligations under the contract and they then state "the extent of Appellees performance under the contract". Appellees' argument is not sound.

In the first place, implied obligations of good faith and fair dealing are not mentioned; and such obligations may be of the utmost importance.

> "If the cooperation of the other party is necessary for successful performance of an obligation, a promise to *give that cooperation,* and *not to do anything which prevents* realization of the fruits of performance, will often be implied. This is sometimes referred to as an implied covenant of good faith and fair dealing." Witkin, Summary of California Law. Contracts, Sec. 242, page 271; (italics in original).

Professor Witkin's Statement is conservative. See *San Bernardino Valley etc. Co. v. San Bernardino Valley etc. District,* 236 Cal. App. 2d 238 (1965) at page 257.

Appellees' obligation to develop the water lands is not referred to in Appellees' summary* nor do Appellees deny they failed to perform this obligation.

Furthermore, a mere recital of what Appellees have done is not necessarily sufficient to show that they have not repudiated. Repudiation is often accomplished by an omission coupled with a positive assertion that the contracting party will not perform. *Robinson v. Raquet,* 1 Cal. App. 2d 533 (1934) at pages 542-543.

Simi Valley's "Further, Separate and Third Defense" in the Answer of defendant Simi Valley Development Company to plaintiffs' First Amended Complaint, alleged that "the building of pipe lines in the manner and as provided in said agreement . . . require the performance of an illegal act . . ." [Former Record, p. 156]. It is true that this alleged defense does not go so far as to say that *all* performance by defendants was illegal; but the assertion that laying the pipe lines was

*We do not say that Appellees have ignored Appellants' contention. But the issue is argued elsewhere in Appellees' Brief.

illegal is sufficient so far as the arbitration was concerned, because the performance of that act (and building reservoirs) are the only acts concerning which an arbitration might be requested.

This pleading alone constitutes a repudiation so far as the arbitration is concerned.

The most serious aspect of Appellees' conduct was their assertions that plaintiffs must make a new contract with defendants "or else I [Riess] get nothing; they will sit on it, wait until the Metropolitan comes in, and then I am boxed in, my wells would not be worth anything, and I am out" [Rep. Tr. Vol. 3, pp. 309-310]. This testimony, not denied, indicates, we believe conclusively, that Appellees intended to and did use their greater financial resources in an effort to compel Appellants to accept less than the contract provided for.

Appellees say (Appellee's Br. p. 30) that no demand in writing was made on them for water, and accordingly they "are not in default [in performance] of this obligation". Please note that Appellees do not say that demand was not made, nor did they offer any evidence denying the plaintiffs' testimony that demand was made; nor do Apellees anywhere deny that they told Riess he would never get water. Under these circumstances, no demand whatever was necessary. The law does not require a futile formality.

In *Wood v. McDonald,* 66 Cal. 546 (1885), the court said at page 547:

> "Proof of any circumstances which would satisfy a jury that a demand would be unavailing—as a refusal by the defendant to listen to one, or a statement in advance that he will not deliver—will be sufficient to excuse proof of a demand."

See also *Merrill v. Merrill,* 95 Cal. 334 at page 338 (1892).

One of the circumstances which make demand unnecessary is an indication of abandonment. See *Licbrand v. Otto,* 56 Cal. 242 (1880).

Finally, the court is requested to consider the following: Appellees and their counsel were sufficiently sophisticated to know that a written demand for water could well be taken as an election by Appellants to forgive Appellees' conduct, and thus as a waiver of Appellants' right to accept the repudiation. Appellants did not wish to condone Appellees' behavior or to do anything which might be construed as a waiver.

IV.

The Implied Covenant of Fair Dealing Is Not Limited to Oil and Gas Contracts: Every Contract Includes an Implied Covenant That Each Party Will Do Everything Necessary to Accomplish Its Purposes.

Appellees contend that the implied covenant to produce, in contracts in which the consideration payable is measured by the amount of production, applies only to gas and oil ventures. Appellants contend that Appellees are in error. No implication concerning the contemplation of parties is necessary, because that is stated expressly in paragraph 3 of the 1955 agreement (Appendix Appellants' Op. Br. p. 6):

> "3. Subject to the physical ability of the well or wells now or hereafter located on the Water Lands to produce sufficient quantities of water so as adequately to service the lands covered by the Montgomery Contract with an adequate supply of

water, *contemplating that such lands will be developed for residential and industrial usages,* I agree . . ." (Italics ours).

Having stated their contemplation, and Appellants having sold the land for a price to be measured by the amount of water produced, Appellants urge that Appellees were under a duty to do everything, including the development of water lands, which should be reasonably necessary to carry out the stated purpose.

In *Harm v. Frasher,* 181 Cal. App. 2d 405 (1960), at page 417, the court said:

> "This covenant not only imposes upon each contracting party the duty to refrain from doing anything which would render performance of the contract impossible by any act of his own, but also the duty to do everything that the contract presupposes that he will do to accomplish its purpose."
>
> "If without the implied obligation the fruits of the contract would be denied to one of the parties, the intent that such an obligation should not exist must clearly appear from the express terms of the contract." (*Bergum v. Weber,* 136 Cal. App. 2d 389 (1955) pp. 393-394).

See also:

1 Witkin, Summary of California Law, 217.

Appellees' argument that such a contract is implied only in cases where the royalty is the sole consideration is not borne out by the decisions. In each of the decisions above cited, other considerations were involved; and this is explicitly stated in *Hartman Ranch Co. v.*

Associated Oil Co., 10 Cal. 2d 232 (1937) (quoted in Appellants' Op. Br. p. 43).

Appellants say that Appellees' argument not only renders the contract illusory with respect to 9/10ths of the cash (or water) consideration, but is contrary to the law concerning implied covenants.

Appellees' argument that the implied covenant is applicable to oil and gas transactions because of the fugaceous nature of oil and gas, does not help Appellees. Underground water, too, is fugaceous. It is found in stationary basins or in flowing underground channels (See general statement, 51 Cal. Jur. 2d 856, Water, Sec. 388; *Vineland Irrigation District v. Azusa Irr. Co.,* 126 Cal. 486 (1899); and see 3 Farnham, Water and Water Rights, pp. 2710-2716).

Water does not respect surface boundaries of ownership; any overlying landowner may syphon off as much as he may reasonably use (*Tulare Irrigation District v. Lindsay-Strathmore District,* 3 Cal. 2d 489 (1935)).

With respect to water in wells, Farnham says:

> "The right to make lawful use of one's own property regardless of the effect upon percolating water on a neighbor's land applies also in case of wells. So that one may make improvements on his property although the effect is to drain the water from his neighbor's well. And he may dig a well on his property and even sink it lower than his neighbor's well, although the result is that his neighbor's well becomes dry." (3 Farnham, Water and Water Rights, p. 2716).

Appellees' argument that a covenant will not be implied because the parties have expressly dealt with the situation does not correctly state the law. In *Bergum v. Weber,* 136 Cal. App. 2d 389 (1955), the court said:

> "*If without the implied obligation the fruits of the contract would be denied to one of the parties, the intent that such an obligation should not exist must clearly appear from the express terms of the contract.*" (*Id.* pp. 393-394). (Italics ours).

Furthermore, the argument against implication would not be available to Appellees because Appellees have asserted on numerous occasions that they would never deliver water to Appellants.

It is not credible that the delivery of the limited water was intended as a substitute for diligent development of the water lands. It is more reasonable to conclude that the delivery of limited amounts of water was a contractual alternative only if, despite diligent development of the wells, sufficient water was not produced.

See:

Bergum v. Weber, 136 Cal. App. 2d 389 at page 394.

There being no language in the contract to prevent the imposition of the implied duty to develop, and this obligation being necessary to give Appellants the fruits of their contract, the obligation diligently to develop should be implied.

In percentage rental cases it is feasible to appraise the rental value of the property and to determine whether the stated minimum rate approaches that value. This appraisal is not possible in mining cases, par-

ticularly where the mineral is fugaceous, because the value (price, rental, or royalty) depends on the quantity of production. That is the case here.

The foregoing distinguishes the decision in *Lippman v. Sears, Roebuck & Co.,* 44 Cal. 2d 136 (1955), in the respects argued by Appellees. The decision in *Cousins Investment Co. v. Hastings Clothing Co.,* 45 Cal. App. 2d 141 (1941), on examination appears to support Appellant's position. The opinion says, in part:

> "Nor is there anything in the nature of the transaction to justify a finding that the implied covenant was indispensable to effectuate the intention of the parties, nor can it be supported on the grounds of legal necessity. On the contrary, as defendant argues, it would seem that the covenant to pay the minimum rental *was inserted in the lease as a substitute for an express covenant requiring the continuous operation* of the demised premises; that when the rental reserved in a lease is based upon a percentage of the gross receipts of the business, with a substantial, adequate minimum, there is no implied covenant that the lessee will operate its business in the demised premises throughout the term of the lease." (at p. 149; italics ours).

The facts here are contrary to those in *Cousins.* Here the parties contemplated the development of the Montgomery lands by use of water from the Appellants' lands.

Kasey v. Molybdenum Corp. of America, 336 F. 2d 560 (1964), relied on by Appellee, does not in fact decide the question of implied duty to develop, but considers only the question of the Statute of Limitations (see 336 F. 2d at pp. 571-572).

Summarizing, Appellants contend that the parties contemplated the development of the Montgomery lands, and said so; that the implied duty to develop was necessary in order to yield to Appellants the benefits of the contract; and there is nothing in the contract which excludes the implied obligation; on the contrary, a determination that the implied duty was present would render the contract a reasonable one.

V.

Under California Law the Right to Arbitration Does Not Survive an Accepted Repudiation; Further, Repudiation of a Material Provision of a Contract, if Accepted as a Repudiation, Constitutes a Repudiation of the Entire Contract.

Bertero v. Superior Court, 216 Cal. App. 2d 213 (1963), is still the law of California. In that case there was no specific repudiation of the arbitration clause; the repudiation was of the entire agreement. When Bertero sued his former employer, the latter immediately moved for an order to compel arbitration. Nevertheless, the District Court of Appeal said that the employer's repudiation of the contract carried with it the arbitration clause. Following is from the opinion:

> "It is well settled that where the right to arbitrate has been in fact waived, the contract in all other respects may then be enforced in the courts. (Citations). The record before the superior court established *as a matter of law* that National had waived the right to compel arbitration and that Bertero had commenced his action in reliance upon that waiver. It was therefore an abuse of discretion for the superior court to stay the action and order the parties to arbitrate." (*Id.,* pp. 221-222).

Bertero is cited with approval in *Sawday v. Vista Irrigation,* 64 Cal. 2d 833 (1966), and in *Berman v. Renart, etc.,* 222 Cal. App. 2d 385 (1963), though in those cases the facts were different from those at bar.

The decision in *Berman, supra,* however, indicates that our reading of *Bertero* is right.

> "A right to arbitration may be waived. (Code Civ. Proc., Sec. 1281.2, subd. (a) . . .; and it is waived by a repudiation or denial *of the contract* in which the arbitration clause is contained. (*Bertero v. Superior Court* (1963) 216 Cal. App. 2d 123 [30 Cal. Rptr. 719].)" (p. 389; emphasis added).

Local 659 etc. v. Color Corp. of America, 47 Cal. 2d 189 (1956) is a most recent statement by the Supreme Court of California on the subject. Following is from the opinion:

> "A repudiation *of a contract* accepted by the promisor excuses performance by the promisee. (*Bomberger v. McKelvey,* 35 Cal. 2d 607 [220 P. 2d 729]; *Walker v. Harbor Business Blocks Co.,* 181 Cal. 773 [186 P. 356]; Civ. Code, Sec. 1511.) And it is said in *Dessert Seed Co. v. Garbus,* 66 Cal. App. 2d 838, 847 [153 P. 2d 184]:: 'It is well settled that an *abandonment of a contract may* be implied from the acts of the parties and this may be accomplished by the repudiation *of the contract* by one of the parties and by the acquiescence of the other party in such repudiation. This doctrine is supported by many cases. [Citations]'" (at p. 198; emphasis added).

In California the issue of whether a contract containing an arbitration clause is still in effect is a question for the court. *Silva v. Mercier,* 33 Cal. 2d 704, 709 (1949) holds:

> "It has been held that the issue of whether a contract containing an arbitration clause exists, or is still in effect, is not within the purview of the arbitration clause for the reason that if there is no contract there is no provision for arbitration." (Citing cases).

The decision in *Heyman v. Darwins, Ltd.* (1942), A.C. 356, contains some language which may be contrary to California law; but the decision can be distinguished from the case at bar on the ground that the arbitration clause in the English case was as broad as language could make it. "If *any* dispute shall arise between the parties hereto *in respect of this agreement* or any of the provisions herein . . .". The italicized language affords logical justification for holding that the arbitration clause survived the agreement. For example, Lord MacMillan says that in deciding this issue the first question is to determine the nature of the dispute; and he goes on to say:

> "The next question is whether the dispute is one which falls within the terms of the arbitration clause. *Then sometimes the question is raised whether the arbitration clause is still effective* or whether something has happened to render it no longer operative. Finally, the nature of the dispute being ascertained, it having been held to fall within the terms of the arbitrationn clause, *and the clause having been found to be still effective,*

there remains for the Court the question whether there is any sufficient reason why the matter in dispute should not be referred to arbitration."

Bertero was based on C.C.P. Sec. 1281.2 That section requires arbitration unless, "The right to compel arbitration has been waived by petitioner." *Bertero* held that a repudiation of the entire contract constituted a waiver of the right to arbitration, even though the petitioner asked for arbitration in its first appearance in court (see 216 Cal. App. 2d at p. 221).

In *DeLillo v. Lizza & Sons, Inc.*, 7 N.Y. 2d 102, 164 N.E. 2d 95 (1959), the arbitration clause encompassed, "all questions that may arise under this contract and in performance of the work hereunder". The lower court had relied on an earlier decision, *Young v. Crescent Dev. Co.*, 240 N.Y. 244, 148 N.E. 510; but the Court of Appeals said, "The law has been changed since then", and cited an amended section of the Lien Law (see 164 N.E. 2d 96).

In *Batter Building Materials Co. v. Kuchner*, 142 Conn. 1, 110 A. 2d 464 (1954), the court acknowledged it was departing from established law in following *Heyman v. Darwins.*

The annotation in 3 A.L.R. 2d 410 shows no California decision following the rule in *Heyman.* The California cases there cited are to the contrary (see *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246 (1890); *Jacobs v. Farmers Mtl. F. Ins. Co.*, 5 Cal. App. 2d 1 (1935); *Bass v. Farmers Mtl. Prot. Co.*, 21 Cal. App. 2d 21 (1937).

In fact, the annotation referred to covers the present situation with the statement at 3 A.L.R. 2d page 421.

Appellees' reasoning seems to confuse two separate propositions. The first is that the repudiation of the right to arbitrate is required to deprive a party of that right. The second proposition is that a repudiation of the contract as a whole carries with it the repudiating party's right to demand arbitration. It appears probable that the English, New York, and Connecticut decisions are contrary to the second proposition, at least in those cases in which the arbitration clause is sufficiently broad. The California rule of decision embraces the second proposition, that is, repudiation *of the contract* deprives the repudiating party of the right to claim arbitration.

One additional principle of California law, while not essential for Appellant's position, deserves the attention of the court. In California, as in many states, a repudiation of a material provision of the contract constitutes a repudiation of the whole contract. In *Alderson v. Houston,* 154 Cal. 1 (1908), the curt said:

> "It was a breach of a material part of an entire contract; 'the first breach by the defendant was a breach of the whole and discharged the plaintiffs from performance of any conditions on his part.'" (at p. 10).

See also:

McMamus v. Bendlage, 82 Cal. App. 2d 916 (197) at page 924;

Compania Engraw v. Scheuley Dist. Corp., 181 F. 2d 876 (9th Cir. 1950) at p. 878;

Orton v. Embassy Realty Associates, 91 Cal. App. 2d 434 (1949) at p. 438;

Steel Duct Co. v. Henger-Seltzer Co., 26 Cal. 2d 634, 160 P. 2d 804 (1945);

Loop Building Co. v. De Coo, 97 Cal. App. 354 (1929), at p. 364, on the effect of annexing an unwarranted condition;

Alphonzo E. Bell Corp. v. Listle, 74 Cal. App. 2d 638 (1946);

Alderson is also cited in *Big Boy D. Corp., Ltd. v. Etheridge,* 44 Cal. App. 2d 114, 121 (1941); *Adams v. Hiner,* 46 Cal. App. 2d 681, 683 (1941); *Abraham Lehr, Inc. v. Cortez,* 57 Cal. App. 2d 973, 978 (1943).

There is no reason to believe that the decisions above cited are not now the law in California. The repudiation by Appellees' conduct, breaches, and assertions here and elsewhere stated amounted to a repudiation of the entire contract. The fact that Appellees did not say specifically that they would not arbitrate cannot save that right because they indicated by their conduct that they had no intention of performing the most material parts of the contract.

Appellees' position on this point comes to this: they contend that they have the right to abandon development of the water lands, to apply economic duress, and to renounce their obligations under the contract; but when Appellants apply to the court for relief, Appellees demand arbitration and a stay of judicial proceedings. That position is not consistent with California law.

VI.

Findings of Fact Were Required; the District Court's Failure to Make Findings Is Reversible Error.

Appellants recognize that this is a subsidiary point on this appeal. The point would be of value to all parties if this court were to hold, as Appellants contend, that a repudiation of the entire contract, or of a material provision of it, would deprive Appellees of the right to demand arbitration of what is a minimal item; on such a holding by this court, if this court should nevertheless not find in accordance with Appellants' contention that Appellees had repudiated the contract, the issue of repudiation would be tried, and Findings of Fact would be made. At present there are no Findings concerning repudiation.

Appellees' position is that the decision in *Baltimore Contractors v. Bodinger*, 348 U.S. 176 (1955) overruled *Shanferoke Coal etc. v. Westchester Service Corp.*, 293 U.S. 449 (1935). We submit that Appellees' position is erroneous.

Although *Baltimore* cites *Shanferoke*, *Baltimore* does not expressly or otherwise overrule *Shankeroke*. The facts in *Baltimore* were different, and a majority of the court, through recognizing the dubious significance of the difference, though that a different rule should be applicable to the situation in *Baltimore*.

In *Baltimore* the court found that the contractual provisions "did not constitute an agreement to arbitrate". (348 U.S. at p. 77), and thus refused to grant a stay. The Supreme Court said of this:

> "Whether the District Court was right or wrong in its ruling that the contract provision did not

> require arbitration proceedings, it was simply a ruling in the only suit pending, actual or fictional. . . . This present case is to be distinguished from the Shanferoke Coal & Supply Corp. Case, 293 U.S. 449, 79 L. Ed. 583, 55 S.Ct. 313, supra, note 5, in the same way. There is a *common-law action* a motion for an interlocutory injunction on an equitable defense was refused." (348 U.S. at 184).

Shanferoke was an action on a contract, not an action in equity. The only thing in the case which was equitable in nature was the special defense of arbitration. Following is from the opinion in *Shanferoke:*

> "We are of the opinion that the special defense setting up the arbitration agreement is an equitable defense or cross-bill within the meaning of Sec. 274b; and that the motion for a stay is an application for an interlocutory injunction based on the special defense." (79 L. Ed. 586).

Baltimore is not inconsistent because the agreement sued on, so it was held, did not constitute an agreement to arbitrate.

In any event, Appellees "Notice of Motion to Stay Proceedings Pending Arbitration" [Clk. Tr. p. 22, *et. seq.*] was, in effect, the interposition of an equitable defense as in *Shanferoke.*

Carey v. Carter, 344 F. 2d 567 (1965), which we have cited in our Opening Brief, was decided after *Baltimore;* presumably that court knew the *Baltimore* decision and understood the distinction between the facts in *Baltimore* and the facts in *Shanferoke.*

The failure to make Findings therefore constituted reversible error.

VII.

The Record Shows That the District Court Did Not Consider the Question of Repudiation; the "Finding" That Defendants Were Not in Default Was Erroneous.

Appellees deal with Appellants' argument on this point as though the only issue were one of language. Appellants' argument is primarily one of substance, the announced refusal by the District Court to consider the question of repudiation on the hearing for arbitration [Rep. Tr. Vol. 5, p. 673], and that repudiation was breach indeed. Appellees have dealt with substantive questions elsewhere, and accordingly Appellants believe no further reply is necessary here, except to point out that even if this court should hold against Appellants on all other points, the order of the District Court should be clarified to prevent unintended injury to plaintiffs.

Conclusion.

Appellees complain (at p. 15 of their Brief) that Appellants have made "inflammatory remarks". But it is natural for persons who have been badly hurt to cry out; just as it is the practice of those wto wish to use the law as a means of delay to demand every procedural punctilio and if possible to defer substantive determinations. Here Appellees seek arbitration of a miniscule point (the determination of damages for past delay in their building reservoirs, etc.), and have obtained a stay of all judicial proceedings until that arbitration is completed.

Appellants have parted with their land and have otherwise fully performed. The letter of Simi Valley

(quoted at pp. 10 and 11 of Appellees' Br.) sets out the contours of this case. That letter says that if Appellants are not willing to give up their stock interest and to accept only one-half of the instalments due, then Simi will demand arbitration. Stated more generally, and directly relevant to this appeal, the letter says, Now that you have done all required of you under the contract, you must give up substantial rights; if you refuse, we shall exercise our rights under the contract to arbitrate, litigate, and we will cause you ultimately to meet our terms. The evidence below substantiates this construction.

Arbitrations are usually designed to determine the existence and effect of breaches. Not so here. The arbitration was to determine the sufficiency of water only as a prerequisite to extending pipe lines and building reservoirs. Furthermore, a repudiation or renunciation of a contract, as was proved here, cannot be the subject of an arbitration. To arbitrate there must be an agreement to submit.

This court should not allow the procedural aspects of the law to be paramount to the administration of justice. A reversal with direction to find that Appellees have repudiated would be right. If the court is unwilling to make that determination on this record, the case should be reversed with instructions permitting defendants to file their Answer to the Complaint, and directing that the issue of repudiation be tried first in order to determine whether there still remains an agreement to submit to arbitration.

Respectfully submitted,

MORRIS E. COHN,
Attorney for Appellants.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules as modified by the Order of this court filed March 14, 1967.

MORRIS E. COHN

No. 20,719

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE R. WILLIAMS, et al.,
Appellants,

vs.

PACIFIC MARITIME ASSOCIATION,
a non-profit corporation, et al.,
Appellees.

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No. 20,719

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BRIEF FOR APPELLANTS

I

STATEMENT OF JURISDICTION

Plaintiffs and appellants (hereinafter referred to as "plaintiffs") brought this action in the District Court against the defendants and appellees (hereinafter referred to as "defendants") alleging in their Fourth Amended Complaint, in substance, that plaintiffs were longshoremen in the Port of San Francisco, employed by defendant Pacific Maritime Association (hereinafter referred to as "P.M.A.") and were members of a bargaining unit whose certified collective bargaining representatives were defendants International Longshoremen's and Warehouse-

men's Union and I.L.W.U. Local No. 10 (hereinafter referred to as "union defendants"); that the union defendants, with the cooperation of defendant P.M.A. violated their duty to fairly represent plaintiffs in negotiating and administering the collective bargaining agreement; that defendants breached the specific terms of the collective bargaining agreement; and that as a result of the wrongful conduct of defendants, plaintiffs were removed or "deregistered" from the employment lists and prevented from working as longshoremen and from advancing to a higher employment category. It was further alleged that the individual defendants conspired together in performing these wrongful acts. Plaintiffs prayed for both injunctive relief and money damages. The District Court dismissed the Fourth Amended Complaint without leave to amend, primarily for lack of jurisdiction, and plaintiffs appealed to this Court. Plaintiffs contend that the District Court had jurisdiction to hear the cause under § 301 of the Labor Management Relations Act, 29 U.S.C.A. § 185, and 28 U.S.C.A. § 1337. This Court has jurisdiction by virtue of 28 U.S.C.A. § 1291.

II

STATEMENT OF THE CASE

A. Background of the Cause

Plaintiffs commenced their employment as longshoremen in the months of June and August, 1959. Their employer, defendant P.M.A., is a multi-em-

ployer bargaining representative of the major stevedoring companies on the Pacific Coast, and an employer within the meaning of § 2(2) of the Labor Management Relations Act, 29 U.S.C.A. §§ 141 *et seq.* The defendant International Longshoremen's and Warehousemen's Union is the certified collective bargaining representative for longshore employees on the Pacific Coast, and recognized as such under § 2(5) of the Act. I.L.W.U. Local No. 10 is the International Union's local affiliate in San Francisco. Plaintiffs are not now and have never been members of the union.

Over the past thirty years, defendants have negotiated and entered into a series of collective bargaining agreements. The most recent such agreement at the time of the District Court proceedings was the "Pacific Coast Longshore Agreement 1961-1966". A copy of this agreement appears at R. 4.*

The agreement provides for two classifications of longshoremen: full registration and limited registration. First preference of employment and dispatch is given to fully registered longshoremen, and second preference is given to limited registered men (§ 8.41). The agreement further provides for the establishment of joint committees in each port composed of representatives of the employer and the union (§ 17.1). These port committees, called "Joint Port Labor Relations Committees," have authority to establish local rules governing the day-to-day operation of the con-

*Citations to the record will be in this form, thus, "R. 4" refers to Record, p. 4.

tract. In 1958, the Port Committee in San Francisco issued a memorandum entitled "Memorandum of Rules Governing Registration and Deregistration of Longshoremen in the Port of San Francisco, March 18, 1958". A copy of this memorandum, hereinafter referred to as the "1958 Rules" was attached to the Fourth Amended Complaint, marked Exhibit "A", and appears at R. 123-130. Under the terms of the 1958 Rules, longshoremen having full registration are designated Class "A" and longshoremen having limited registration are designated Class "B". The 1958 Rules, as well as other memoranda subsequently issued by the Port Committee, established the practice and procedure for advancement of longshoremen from the Class "B" list to the Class "A" list. These rules were established by defendants under the terms of the collective bargaining agreement in effect prior to the present agreement.

On or about June 17, 1963, plaintiffs were notified of their (individual) summary deregistrations by the Joint Port Labor Relation Committee, allegedly because of certain violations of recently adopted work rules, the "1963 Rules". (R. 2, 113.) What purports to be a summary of the 1963 Rules is set forth in Exhibit I to the Affidavit of J. A. Robertson, Secretary of P.M.A. dated March 15, 1965. (R. 91v.)

By reason of the deregistrations, plaintiffs were no longer dispatched for employment from the dispatch hall operated jointly by defendants and were no longer eligible to work as longshoremen on the Pacific Coast.

On April 14, 1964, plaintiffs filed the herein action against the defendants. The original complaint was dismissed by the District Court for failure to adhere to the pleading requirements of Rule 8 (Fed. R. Civ. P.). Thereafter, the First Amended Complaint and the Second Amended Complaint were also dismissed for the same shortcomings. A Third Amended Complaint was filed alleging simply that the defendants had conspired to deprive plaintiffs of their right to work. (R. 7-12.) While the Third Amended Complaint was before the District Court, the plaintiffs who are now before this Court obtained present counsel and served and filed a Fourth Amended Complaint. The Fourth Amended Complaint was the only pleading prepared by present counsel.

On June 21, 1965, defendants moved to dismiss the Third Amended Complaint, the motions being directed to the three plaintiffs who chose to remain with the attorney who initially represented all of the plaintiffs. The Third Amended Complaint was dismissed without leave to amend* on the following grounds (R. 181-182):

> "It Appearing To This Court that it has no jurisdiction over the causes of action pleaded in the Third Amended Complaint, that exclusive jurisdiction over the alleged wrongful acts lies in the National Labor Relations Board, that this Court has no jurisdiction over the individually-named defendants, that it has no jurisdiction to issue the requested injunction due to the Norris-La Guar-

*An appeal from the order of dismissal is now pending in this Court, Docket No. 20301.

dia Act, that no breach of contract is or can be pleaded, that plaintiffs do not have standing to sue, that the applicable statute of limitations had expired prior to the filing of this action, and that plaintiffs, although given an opportunity to present their claim to an arbitrator, have failed and refused to do so, and

"It Further Appearing that the plaintiffs represented by Mr. Gordon have filed three prior complaints, each of which has been dismissed, that the acts complained of do not involve a breach of the collective bargaining contract but, if anything involve unfair labor practices, and that the plaintiffs represented by Mr. Gordon* have shown no possible basis under which they might be able to plead a cause of action within this Court's jurisdiction.

"It Is Hereby Ordered that the proposed injunction be and is hereby denied, and that the Third Amended Complaint be and is hereby dismissed without leave to amend."

B. The Allegations of the Fourth Amended Complaint

The Fourth Amended Complaint (R. 107-129) sets forth five causes of action. The first two counts are based upon the breach by the union defendants of their duty to give "fair representation" to all members of the bargaining unit, to act in good faith and without hostile or invidious discrimination based upon irrelevant and invidious distinctions. Defendant P.M.A. is charged with cooperating with the union defendants and accepting the benefits of this discrimi-

*Plaintiffs' former attorney.

natory treatment. This breach of a duty imposed upon a statutory bargaining agent was first recognized by the Supreme Court in *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944), and has been followed by a long line of cases arising under both the Railway Labor Act and the Labor Management Relations Act (to be discussed *infra*). It is the contention of plaintiffs that the *Steele* line of cases clearly establish the jurisdiction of the District Court to adjudicate the first two counts. 28 U.S.C.A. § 1337.

The first count alleges that as of June 17, 1963 all plaintiffs had earned their livelihood and been regularly employed as longshoremen for approximately 4 years (paragraphs 17-18); were registered as Class B longshoremen, were in good standing, were guilty of no current infractions and had corrected all past violations of rules (paragraph 19); were notified of their immediate and summary deregistration by defendants at the same time that defendants decided to promote 400 (other) Class B longshoremen to the Class A category (paragraph 20); that the decision to deregister plaintiffs and promote others was purportedly made pursuant to a new set of rules jointly adopted by defendants a few weeks prior to plaintiffs' notification of defendants' decision to deregister them (the "1963 Rules"); that plaintiffs were at no time notified or otherwise informed that changes in the rules were being considered or being contemplated, plaintiffs were not given an opportunity to present their point of view at any time up to the adoption of the new rules, and plaintiffs were never given

notice of the new rules until they were informed of the decision to deregister them (paragraph 21). The first count further alleges that the new rules were arbitrary and not reasonably relevant to the determination as to which Class B longshoremen should be promoted to the Class A category (paragraph 22); and were wholly irrelevant and capricious in determining who should be deregistered (paragraph 23); that the determination to promote some Class B longshoremen and deregister others was based on a retroactive application of alleged violations which served to penalize conduct which was not grounds either for denying promotion or for deregistration at the time the alleged acts were committed, but were grounds for only a nominal monetary fine; that the penalties imposed by defendants were contrary to the rules which existed at the time of the alleged acts (paragraph 23); and but for the conduct of defendants, each of the plaintiffs would have been a fully registered Class A longshoreman and member of Local No. 10 from on or about June 17, 1963 (paragraph 28).

The second count alleges that the 1963 rules governing promotion and deregistration were not applied equally and fairly against plaintiffs but were applied arbitrarily and with hostile discrimination in that other Class B longshoremen who had failed to meet the new standards were not deregistered but were promoted to Class A (paragraph 38); that the union defendants failed to fairly represent plaintiffs by agreeing to the unequal application of the new rules

and causing or agreeing to the deregistration and denial of promotion of plaintiffs (paragraph 39); and that defendant P.M.A. participated in the denial of plaintiffs' rights to fair representation in the administration of the collective agreement by joining in the unfair and unequal application of the new rules by the union defendants (paragraph 40).

The third count alleges that defendants breached the terms of the collective bargaining agreement by not advancing plaintiffs to Class A and by deregistering them from the "B" list. Plaintiffs contend that the Court's jurisdiction to hear this cause of action for breach of that collective bargaining agreement is provided by § 301 of the Labor Management Relations Act (29 U.S.C.A. § 185) as interpreted by the Supreme Court in *Smith v. Evening News,* 371 U.S. 195 (1962).

The fourth and fifth counts charge the individual defendants with conspiring to cause the employer and union defendants to pursue the hereinabove described wrongful conduct and pray for punitive damages. Plaintiffs contend that there is pendent federal jurisdiction to hear these counts which sound in tort under California State law.

1. The Affidavit of Plaintiff Stanley L. Weir

Plaintiffs submitted an affidavit of plaintiff Stanley L. Weir with numerous exhibits, wherein the events giving rise to the Fourth Amended Complaint were set out in detail (affidavit, R. 289-345, exhibits, R. 190-

278). This affidavit, submitted in opposition to the defendants' motions to dismiss, is reproduced in the appendix to this brief, and we invite the Court's attention thereto.

The Weir affidavit related the events leading up to the deregistrations of June 17, 1963. Approximately one week prior to February 26, 1963, the Class B longshoremen received letters on the stationery of Local No. 10 notifying them that the local was conducting an investigation of their eligibility for membership in the union, and that their presence was required before the union investigating committee on February 26, 1963 at the union office (R. 291-292). (It is alleged in paragraph 15 of the complaint that only Class A longshoremen were entitled to become members of Local No. 10.) Plaintiff Weir appeared at this meeting and the affidavit sets forth the names of the union personnel who were present. (R. 293.) Mr. Weir was told that his record was clear for union membership but a short time later was told that his record was not in fact clear because of "low-man-out" violations the preceding year ("low-man-out" is the means used to determine the order of dispatch, i.e., the longshoremen with the lowest number of hours worked will be the first to be dispatched to a job); after protesting, Mr. Weir was informed by the chairman of the committee that the procedural rules of the committee were changed as of that evening and there would be no opportunity to defend one's self before the committee; and it would be necessary to go to the record checker's office (located at the dispatching hall operated

jointly by the defendants) the following morning to do so (R. 293-294).

The following morning at the record checker's office, union officials called in one of their associates who had been "specially" handling Mr. Weir's case; after two accusations of dropping hours, i.e., reporting a lower number of hours worked so as to obtain an earlier dispatch, Mr. Weir showed the union officials, to their satisfaction, that he was in fact guilty of no such violations. He was then informed that he could appear at another meeting of the Investigating Committee (R. 295-296).

Mr. Weir, however, was not permitted to appear before the Investigating Committee on March 4, 1963, after arriving as directed (R. 296).

On March 8, 1963, he wrote a letter to the President of Local No. 10, requesting an opportunity to clear himself of any alleged violations, after noting that International President Harry Bridges had made it clear at a meeting of Local No. 10 that the local's Investigating Committee had rejected the men it considered "chisellers, dues delinquents, and contract violators" (R. 297). This letter was never answered (R. 298).

On May 14, 1963, Mr. Weir sent telegrams to the union and employer co-chairmen of the Joint Port "B" Relations Committee, which was then in charge of the matter, requesting to be notified, confronted and tried for any charges against him. There was no response to these telegrams (R. 298-299). On June 10,

1963, Mr. Weir sent letters to the Secretary and Chairman of the Joint Port Labor Relations Committee, representatives of the employer and union respectively, and a carbon copy to International President Harry Bridges, summarizing his frustrating experiences in attempting to clear up whatever charges might be pending against him and requesting union membership and A registration (R. 299-302). A copy of this letter was mailed the following day to Mr. Paul St. Sure, President of P.M.A. Neither this letter nor its copies were answered by defendants (R. 302).

What may euphemistically be called the first response of defendants to the inquiries of Mr. Weir was a form letter from the Longshore Labor Relations Committee of San Francisco, dated July 17, 1963, notifying him of his deregistration "for cause as a Class B longshoreman, pursuant to the provisions of #9 of the Memorandum of Rules concerning Registration and De-Registration of longshoremen in the Port of San Francisco. Such de-registration was based upon the determination of the Committee that you have violated the applicable rules." (R. 302-303.) We direct the Court's attention to Section 9 of the 1958 Rules (Exhibit A to Fourth Amended Complaint, R. 126-129) where it is stated that a notice of deregistration is to be by letter in substantially the following form:

> "You are hereby notified that on the day of ....., 19....., at a regular meeting of the Joint Labor Relations Committee, by unanimous vote, you were de-registered for cause as a Class B longshoreman, pursuant to the provisions of Section

> 9 of the Memorandum of Rules Concerning Registration and De-registration of longshoremen in the Port of San Francisco. Such de-registration was based upon the determination of the Committee that you have violated the applicable rules, and *particularly that you have (here give particulars).*" (Emphasis added.)

We note that the form letter notification of deregistration did not state that the action taken was by unanimous vote and is totally void of any particulars of the alleged violations, as required by Section 9. The notice of deregistration further stated:

> "In the event that the Joint Labor Relations Committee receives within (15) days after the date of this letter, a detailed written statement signed by you, *satisfactorily demonstrating that there is no ground for your de-registration,* and requesting a hearing, at which you may show cause, if any you have, why such de-registration should be rescinded" (R. 303). (Emphasis added.)

We are at a complete loss to understand how a deregistered longshoreman may reasonably be expected to provide a detailed written statement "satisfactorily demonstrating that there are no grounds for his deregistration", when he has never been provided with the specific reasons for his deregistration! Yet this was the procedure followed by the union defendants (with the active participation of the employers), while acting on behalf of plaintiffs as their bargaining representatives in administering the collective bargaining agreement.

On June 21, 1963, Mr. Weir wrote to the Joint Port Labor Relations Committee, hereinafter referred to as ("Port Committee") pointing out that the notice of deregistration did not inform him of the offenses he allegedly committed, as required by Section 9. He further requested a hearing and a written, detailed list of charges to enable him to prepare for the hearing (R. 310-311). The Port Committee responded by letter dated August 5, 1963, advising the date of the hearing but no statement of charges. Mr. Weir then sent a telegram to the Port Committee on August 7, 1963, once again requesting to be informed of charges against him. The Secretary of the Port Committee (an employer representative) replied by advising, "Your union is your exclusive bargaining representative" (R. 312). Mr. Weir did as instructed by sending a telegram on July 9, 1963, to the President of Local No. 10 requesting a statement of charges in order to prepare his defense. He received no response (R. 312-313).

On July 11, 1963, Mr. Weir appeared before the Port Committee. As the session opened, he was told:

(i) He would not be permitted to have counsel;

(ii) He would not be permitted to produce witnesses on his own behalf;

(iii) He would not be told the exact nature of the cause of deregistration, but only the general nature of the violation;

(iv) If he wanted to ascertain the exact nature of the charges, it would be necessary for him

to appear entirely unaccompanied at the records office of the Port Committee in one week (R. 312).

At the "hearing" before the Port Committee, the union representatives made no offer to represent him or to urge the Port Committee to be specific about the reasons for the deregistrations, or to be of any assistance whatsoever. The union representatives, exclusive bargaining representatives of plaintiffs, were the prosecutors, rather than the defendants of Mr. Weir (R. 313). Although not permitted to have counsel, two P.M.A. attorneys were present and provided counsel to the Secretary of the Port Committee (R. 318).

Mr. Weir stated to the Port Committee that his only possible violation as uncovered by the record checker hired by the union was for two-and-one-half hours of low-man-out (below the permissible limits under the 1963 Rules) which he denied. The President of Local No. 10 interrupted to read the report on Mr. Weir and confirmed his statements (R. 315). At the conclusion of his appearance before the Port Committee, one of the employer's representatives, Mr. Holtgrave, said "Are you claiming discrimination by this Committee? Because if you are, the rules say that you can take an appeal within ten days from today. Do you want to do that?" (R. 315). Mr. Weir responded, "How can I appeal within ten days from today from a decision which you tell me you will not reach for another two weeks?" Mr. Holtgrave did not reply (R. 316). It should be noted that at no time during the course of this "hearing" did the Port

Committee specify the nature of the alleged violations justifying deregistration.

On July 17, 1963, Mr. Weir again appeared at the record checker's office and was accused of 22½ hours of low-man-out violations on specific dates. He brought along his own records (each longshoreman carries his individual time book) which contradicted the records of the Port Committee. The officials of the Port Committee refused to look at Mr. Weir's records and refused to produce the sign-in sheets (the daily records from which the formal, detailed records are taken) for his inspection (R. 316).

On July 18, 1963, Mr. Weir wrote to the Secretary and Chairman of the Port Committee requesting a hearing to determine the validity of these now disclosed charges. He also protested the fact that the records of men who were registered (in Class A) were checked for only a four-week period while his records were checked for at least sixteen weeks (R. 317-318). On July 23, 1963, the Port Committee reaffirmed the deregistration, without specifying the reason for its decision (R. 319). On July 27, 1965, Mr. Weir wrote a letter to the Port Committee appealing his deregistration (R. 319-320).

Pursuant to Section 17.261 of the collective bargaining agreement, the appeal (if the decision of the Port Committee to deregister plaintiffs is in fact appealable) should have been referred immediately to the Joint Coast Labor Relations Committee, the next step in the grievance procedure. During the eight-and-

three quarter months following the filing of the appeal, Mr. Weir tried to ascertain if and when the committee and the defendants intended to act on the appeals of the deregistered men and was informed on the telephone that the matter was closed, that the decision of July 23, 1963 was final (R. 32). After waiting eight-and-three-quarter months, plaintiffs commenced this action on April 14, 1964. In December, 1964, the Coast Labor Relations Committee affirmed the deregistrations.

At this point, the Court has no doubt observed that only one of the fifty-one plaintiffs in this case submitted an affidavit to the District Court to controvert the affidavits submitted by defendants setting forth defendants' version of the deregistration. We note, however, that the procedure followed by defendants was uniform as to all alleged violators of the alleged 1963 Rules, the only difference being the specific violations alleged to have been committed by each plaintiff. We direct the Court's attention to the Reporter's Transcript of Proceedings of August 16, 1965, pp. 37-38, the oral argument in the District Court on the motions to dismiss. At that time, plaintiffs' counsel made an offer of proof wherein he offered to supply evidence that the kind of discrimination that was shown against Mr. Weir, the unfair representation, could be shown against practically every one of the plaintiffs, if not all of them. Such an oral offer of proof by counsel in summary proceedings has been recognized by this Court in determining the existence of facts indicating hostile discrimination or bad faith

by a collective bargaining representative in collusion with an employer. *Hardcastle v. Western Greyhound Lines,* 303 F.2d 182, 186-87, fn. 8 (9th Cir. 1962). The Court did not imply that making such assertions in an offer of proof would in and of itself have been sufficient to warrant a denial of summary judgment. Unlike the cited case, the plaintiffs in the case at bench made their offer of proof to corroborate the detailed affidavit of plaintiff Weir. Under these circumstances, we submit that the District Court was required to consider the oral offer of proof with the Weir affidavit of plaintiff to determine if there was sufficient evidence to deny summary judgment.

The Weir affidavit also related the hostile environment concerning B men on the waterfront. The opposition of the B men was based upon the refusal of P.M.A. and the union to advance them to the A category, combined with the payment of $29,000.00 by the P.M.A. into a fund whose only beneficiaries would be the Class A longshoremen registered as of August 10, 1959 (R. 339-341).

In 1960, the union permitted the B men to elect three of these numbered as representatives to the union Executive Committee. After these representatives were elected (among them plaintiff Weir), they were permitted to attend few sessions of the Executive Board and met with hostility there. One union official told the B representatives that they were being watched continuously and that they would be deregistered at the first opportunity that presented itself. Shortly thereafter, two of the B representatives

were deregistered. Another official told plaintiff Weir, "If they don't get you one way, they will another". (R. 341-342). Mr. Weir was also advised in the office of the President of Local 10, that ". . . it wasn't smart . . ." of plaintiff Weir to distribute on the waterfront a magazine article critical of the P.M.A.-I.L.W.U. contract and exploitation of the B men thereunder (R. 342).

The unequal treatment of B men by the defendants as compared to the A men is illustrated by the Local No. 10 Longshore Bulletins which are discussed in the affidavit (R. 56-57) and submitted as Exhibits I-1 through I-5 (R. 273-278). These union documents show that no Class A longshoremen and union member was ever deregistered for violations of existing rules which were more serious than those committed by plaintiffs. We invite the Court's comparison of the work records of the A men, as set forth in the exhibits, and the purported work records of plaintiffs as reported by defendant P.M.A. (R. 91-P—91-S).

2. Exhibits Annexed to the Affidavit of Plaintiff Stanley L. Weir.

Numerous exhibits relevant to this proceeding were annexed to the Weir affidavit (R. 190-287). We shall discuss these exhibits only briefly to explain some of the relevant portions as they apply to the instant controversy. Because of the limitations imposed by 9th Cir. R. 18(e), we invite the Court's attention to the entire set of exhibits.

Exhibit A. (R. 191-194.) These are the low-man-out rules dated 5/27/59, Paragraph 17 thereof provides:

"Checks will be made each week and violators will receive the following penalties:

First offense—30 days off

Second offense—6 months off

Third offense—Cancellation of Registration." (R. 194).

We note there to be no provision in these rules (or any other set of rules or regulations submitted to the District Court) which would authorize the deregistration of any longshoreman for a first offense. As stated above, these rules were dated 5/27/59. The defendants did not submit an actual copy of any superseding rules to the District Court. We also note the complexity of all the rules governing dispatch which are set forth in that exhibit.

Exhibit C. (R. 197-213.) This is a decision of Donald Gibson, Referee for the California Unemployment Insurance Appeals Board, entitled, "In the Matter of James V. Carter, et al., Claimants, Pacific Mutual Association, Employer." This decision on claims by many of the plaintiffs for unemployment compensation following their deregistrations, was reached after considering nearly 1,700 pages of transcript, including several hundred pages of testimony by representatives of defendants (as related by plaintiff Weir, R. 322). The Referee's opinion discussed the low-man-out rules (Exhibit A to the Weir Affidavit), and it appears from this discussion that the low-man-out rules dated 5/27/59 were still in full force and effect at the time of the deregistration (R. 204-205). The Referee's opinion also set out what appears to be

a copy of minutes of a meeting of the Longshore Labor Relations Committee on July 16, 1963 (subsequent to the deregistrations of June 17, 1963) containing the following:

> "The union submitted the following relative to the registration and de-registration of Class B Longshoremen.
>
> 1. That all B men who are on appeal and who have not been promoted solely because of low-man-out violations shall be given *30 days off as per contract* and promoted to A registration." (R. 205) (Emphasis added.)

From this portion of the record, we may conclude that as of July 16, 1963, the union representatives on the Port Committee, acting pursuant to instructions of their membership, voiced the opinion of their union membership that the only penalty provided in the contract for violators of the low-man-out rules was a thirty day suspension from work. This would be in accord with paragraph 17 of the low-man-out rules dated 5/27/59.

The Referee's opinion goes on to report that the Port Committee meeting of July 16, 1963, was recessed until July 19, 1963 when the employers appeared with their attorney, R. Ernst (R. 205). The employers then stated their opposition to the union matters by referring to "procedures and rules governing registration and deregistration previously agreed to by the parties" (R. 206). Yet the union appeared to be oblivious to the existence of the previously agreed to "procedures and rules", for the minutes do not state

if they admitted or denied the existence of the procedures and rules referred to by the employers. We note that the employers did not refer to the date the alleged procedures and rules were enacted or attempt to define them, but merely stated that "[T]he parties long ago agreed as to what would be good cause for de-registration" (R. 206).

The Referee found that all plaintiffs (at least those concerned with that unemployment proceeding), although delinquent at times with their pro-rata payments for the cost of the hiring hall, were all current as of the date consideration was given to them for reclassification as Class A Longshoremen; that some errors in low-man-out were because of a rule adopted by the dispatcher in connection with Sunday work; and because of lack of knowledge and understanding of the rules and confusion in the minds of plaintiffs as to the proper hours to be used (R. 209). As for those plaintiffs charged with lack of availability for work, in each instance, the referee found that the penalty imposed had been served (R. 209).

We conclude our discussion of this exhibit by referring the Court to the observations of the Referee that ". . . it is inherently impossible to believe that the claimants herein (plaintiffs) could logically have been expected to anticipate that their acts would result in the loss of their employment . . . the claimants did not embark on a course of action which they knew or should have known would result in the loss of their employment. As a matter of fact, over the years a pattern of behavior was established which was

condoned and allowed by the employer, the union and the Joint Port Labor Relations Committee . . . again, emphasis must be placed upon the fact that violations in respect to the working rules or in respect to availability were considered at the time of occurrence and penalties were assessed. These penalties being satisfied, the individuals were continued as Class B Longshoremen and were dispatched to employment as it arose." (R. 210).

Following oral argument of the motions to dismiss, plaintiff's counsel forwarded to the District Court copies of portions of the transcripts of the hearings before the California Unemployment Insurance Appeals Board. Plaintiffs pointed out testimony by a P.M.A. official that the purported 1963 rules under which plaintiffs were deregistered, were not in written form, nor in a single set of minutes form (R. 459). "These matters were discussed orally" (R. 461). The P.M.A. official did not know if the oral discussion was ever reduced to writing (R. 461). The various documents submitted to the Court by defendants *did not contain a single purported copy* of the rules or standards which plaintiffs allegedly violated. We submit that the absence of an adequate explanation for this omission was reason in and of itself for denying the motions for summary judgment. If, as plaintiffs believe, these standards never in fact existed, the deregistrations of plaintiffs would constitute one of the most arbitrary abuses of power ever exercised by a statutory bargaining agent in collusion with the employer.

Exhibit F (R. 230-263) is a Decision of the Trial Examiner of the National Labor Relations Board in San Francisco. This decision, rendered May 4, 1965, concerned charges of unfair labor practices brought against defendants I.L.W.U. Local No. 10 and P.M.A. by five Class B longshoremen who were deregistered at the same time as plaintiffs. The charging parties in the N.L.R.B. proceeding alleged that their deregistrations by defendants, for late payment of their pro-rata share of the cost of operating the dispatch hall were in violation of Sections 8 (b) (1) (A) and 8 (a) (1) of the Labor Management Relations Act, 29 U.S.C.A. §§ 151 et seq. After a hearing where all parties were afforded a full opportunity to be heard, examine, and cross-examine witnesses, adduce evidence, file briefs and submit oral argument, the Trial Examiner made findings of fact and concluded that defendants had committed unfair labor practices. Reinstatement with back pay was recommended (R. 260-263). The Trial Examiner relied upon *Miranda Fuel Co., Inc.,* 140 N.L.R.B. 181, enforcement denied *sub nom. N.L.R.B. v. Miranda Fuel Co., Inc.,* 326 F.2d 172 (2d Cir. 1963), where the National Labor Relations Board applied the doctrine of *Steele v. Louisville & Nashville R. Co.,* 323 U.S. 192 (1944) to Board proceedings for unfair labor practices.

The Trial Examiner's Decision was reversed by the National Labor Relations Board, *Pacific Maritime Association and International Longshoremen's and Warehousemen's Union, Local No. 10 (Johnson Lee),* 155 N.L.R.B. No. 117 (1965). The Board decided that

the acts of defendants did not constitute unfair labor practices, although the opinion of the Board did not discuss the applicability of the *Miranda* case.

This exhibit was submitted to the District Court by the plaintiffs to show the discussion of the deregistration proceedings by a second, independent tribunal (the California Unemployment Insurance Appeals Board, Exhibits C and D, supra, was the other tribunal whose discussion of this evidence was submitted by plaintiff Weir). Both of these tribunals, after extensive evidentiary hearings, found in favor of the deregistered Class B longshoremen on the factual issues litigated therein. The significance of those factual findings differed in each case because of the policy of the specific legislation which was involved. But there is no escaping the obvious conclusion that the referee's decisions in the unemployment compensation proceedings (Exhibits C and D) and the Trial Examiner's Decision (Exhibit F) corroborate, to a large extent, the statements contained in the Weir affidavit and plaintiffs' offer of proof. The corroboration supplied by the Trial Examiner's Decision was that particulars of the cause for deregistration were not provided and the deregistered men had not been informed of the 1963 deregistration standards at any time prior to their deregistration, or of any proposed ground for the action taken against them (R. 237); the Port Committee had not informed any of the men of the "cause" of deregistration at any time prior to the hearing, nor did Local No. 10 take the initiative to inform them of the basis for the deregistration (R.

239). The P.M.A. representative on the Port Committee who testified before the Trial Examiner was "notably lacking in detail" as to the reasons provided to the deregistered men (R. 240). Probable error in the records of the Port Committee (R. 242) was noted as was the failure of the notice of July 23, 1963, reaffirming the deregistrations to provide a specific reason for the deregistrations (R. 242), and the different treatment afforded to Class A longshoremen by Local No. 10 for the late payment of pro rata from that afforded to Class B, different treatment not depending upon any relevant or reasonable distinction (R. 246-247). The Trial Examiner observed that while Class B men were deregistered for late payments ranging from $62 to $80, there were about a dozen members of Local No. 10 (all Class A) each of whom owed substantially more of their pro-rata shares, some owing hundreds of dollars and one, listed as in "jail" being indebted for $1,014 (R. 245-246); "There is no claim by Respondents that any Local 10 member or Class A registrant had ever been deregistered by the Port Committee for . . . pro rata shares." (R. 246, fn. 26).

The N.L.R.B. proceedings are germane here because the defendants urged the proposition on the court below that the plaintiffs' remedy, if any, was to file unfair labor practice charges with the Board. On May 17, 1965, in the interim between the Trial Examiner's Decision and the reversal thereof by the N.L.R.B., most of the plaintiffs in this action filed unfair labor practice charges against defendants. (R. 128, 129). On June 21, 1965, the Acting Regional Di-

rector of the Board in San Francisco refused to issue a complaint by reason of the expiration of the six-month statute of limitations under Section 10(b) of the Act (R. 180 B). The decision of the Acting Regional Director to issue a complaint was affirmed by the General Counsel of the Board in Washington, D.C. on September 24, 1965 (R. 499).

In view of the N.L.R.B. case of *Johnson Lee,* supra, it is doubtful if the conduct herein alleged comes within the definition of an unfair labor practice.

C. The Motions to Dismiss the Fourth Amended Complaint Were Motions for Summary Judgment

On August 16, 1965, the defendants moved to dismiss the Fourth Amended Complaint. The motions to dismiss were based to a large extent upon affidavits with exhibits attached submitted by defendants. In opposition, plaintiffs submitted the affidavit of Plaintiff Stanley L. Weir, also accompanied by exhibits.

Under Rule 12, if matters outside the pleading are presented to and not excluded by the Court on a motion asserting a defense of failure to state a claim upon which relief can be granted (as here), the motion is to be treated as one for summary judgment and disposed of as provided in Rule 56. *International Longshoremen's and Warehousemen's U. v. Kuntz,* 334 F.2d 165, 168 (9th Cir. 1964). Under Rule 56, judgment for the moving party is to be rendered forthwith if the pleadings and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law. Plaintiffs contend that the affidavits and documents submitted by the parties show there to be genuine issues as to numerous material facts concerning the reasons for plaintiffs' deregistrations.

D. The Order Dismissing the Fourth Amended Complaint

On August 16, 1965, oral argument was held on the defendants' motions to dismiss the Fourth Amended Complaint. After taking the matter under submission, the District Court, on October 8, dismissed this complaint. The order reads, in pertinent parts, as follows (R. 500-02):

> "In a formal order filed on July 20, 1965, this court stated the grounds for dismissing the Third Amended Complaint as follows: It appears to this court 'that it has no jurisdiction over the causes of action pleaded in the Third Amended Complaint, that exclusive jurisdiction over the alleged wrongful acts lies in the National Labor Relations Board, that this Court has no jurisdiction over the individually-named defendants, that it has no jurisdiction to issue the requested injunction due to the Norris-LaGuardia Act, that no breach of contract is or can be pleaded, that plaintiffs do not have standing to sue, that the applicable statute of limitations had expired prior to the filing of this action, and that plaintiffs, although given an opportunity to present their claim to an arbitrator, have failed and refused to do so . . .'
>
> "Notwithstanding that the Fourth Amended Complaint is more artfully drafted than its predecessors, and notwithstanding that the language and phraseology of the Fourth Amended Complaint are directly inspired by the most recent

Supreme Court decisions on the subject of § 301 suits, it appears to this court that the underlying events which give rise to the allegations in the complaint, and the basic issues to which these allegations give rise, are identical to, and not different from, the events, allegations and issues involved in the Third Amended Complaint.

"Accordingly, It is Hereby Ordered that the Fourth Amended Complaint be, and the same hereby is, DISMISSED without leave to amend."

III

SPECIFICATION OF ERROR

Plaintiffs contend that it was error for the District Court to dismiss the Fourth Amended Complaint, in that the complaint set forth claims upon which relief could be granted because:

A. Hostile discrimination was alleged;

B. Breach of contract was alleged;

C. Injunctive relief is proper in this type of case;

D. Plaintiffs were not required by the collective bargaining agreement to present their claims to the arbitrator;

E. There was no expiration of any applicable "statute of limitations" barring relief;

F. The District Court had jurisdiction over the individual defendants by reason of pendent federal jurisdiction.

G. There were genuine issues over material facts raised by the affidavits.

IV

ARGUMENT

A. THE "HOSTILE DISCRIMINATION" CASES AND INJUNCTIVE RELIEF.

The allegations in the first two counts and the relief sought by the plaintiffs are similar to those of the petitioners in *Steele v. Louisville & Nashville R. R. Co.*, 323 U.S. 192 (1944). *Steele* was the first in a long line of decisions clearly providing that individual members of a bargaining unit have a cause of action against their exclusive statutory bargaining agent for breach of the latter's duty to represent all members of the bargaining unit fairly and without invidious and hostile discrimination. Because of the impact of *Steele* on subsequent decisions and its bearing here, we cite at length from the opinion.

Steele concerned an action in a state court brought by Negro firemen employed by the defendant railroad. The defendant Brotherhood of Locomotive Firemen and Enginemen, a labor organization, was the exclusive bargaining representative of the craft of firemen employed by the railroad as provided under § 2, Fourth, of the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* The majority of the firemen employed by the railroad were white and were members of the Brotherhood, while a substantial minority were Negroes who were excluded from membership.

The plaintiffs alleged that the Brotherhood, purporting to act as the representative of the entire craft of firemen, without informing the plaintiffs or giving them opportunity to be heard, served notice upon the

employer of its desire to amend the existing collective bargaining agreement in such a manner as to ultimately exclude all Negro firemen from service. New agreements were entered into between the Brotherhood and the employer limiting the plaintiffs' employment opportunities and controlling their seniority rights. The Negro firemen were not given notice or opportunity to be heard with respect to either of these agreements which were put into effect before their existence was disclosed to them. *Id.* at 194-196.

White men junior in seniority were placed in jobs highly desirable in point of wages, hours and other conditions, while the plaintiffs were deprived of employment for sixteen days and then assigned to more arduous, longer and less remunerative work in local freight service. *Id.* at 196.

These allegations from *Steele* are closely analogous to those in the instant litigation and, with respect to the last, it is to be recalled that paragraph 21 of the instant complaint alleges:

> "21. That the aforesaid decision was purportedly made pursuant to an alleged new set of rules adopted by the defendants jointly a few weeks prior to the summary notification of the plaintiffs of the defendants' decision to deregister them; that the plaintiffs were at no time notified or otherwise informed that changes in the rules were being considered; that the plaintiffs were at no time notified or otherwise informed that the adoption of new rules was being contemplated; that the plaintiffs were never given an opportunity to present their point of view, position or interest during or preceding the nego-

> tiations leading up to or at the time of the adoption of the new rules; that the plaintiffs were never informed when the new rules were adopted; that the plaintiffs were never given notice of the new rules or a copy thereof prior to being informed of the decision to deregister them."

Chief Justice Stone, speaking for the Court, emphasized that when Congress enacted the Railway Labor Act and authorized a labor union, chosen by a majority of a craft, to represent the craft, it did not intend to confer plenary power upon the union to sacrifice the rights of the minority of the craft for the benefit of its members without imposing on it any duty to protect the minority. The Court pointed out that since the plaintiffs were neither members of the Brotherhood nor eligible for membership, the authority of the union to act for them was derived not from their action or consent, but wholly from the command of the (Railway Labor) Act. *Id.* at 199.

> "The purpose of providing for a representative is to secure those benefits for those who are represented and not to deprive them or any of them of the benefits of collective bargaining for the advantage of the representative or those members of the craft who selected it." *Id.* at 201.
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> "Once a craft or class has designated its representative, such representative is responsible under the law to act for all employees within the craft or class, those who are not members of the represented organization, as well as those who are members." *Id.* at 201.
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> "Unless the labor union representing a craft owes some duty to represent non-union members

> of the craft, *at least to the extent of not discriminating against them as such in the contracts which it makes as their representative,* the minority would be left with no means of protecting their interests or, indeed, their right to earn a livelihood by pursuing the occupation in which they are employed. . . . The fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and *it is to act for and not against those whom it represents.* It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for who it is exercised unless so expressed." *Id.* at 201-202. (Emphasis added.)

The opinion then continues and in language which has often been repeated, but which warrants repetition again, said:

> "We think the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, cf. J. I. Case Co. v. National Labor Relations Board, supra, 321 U.S. 335, 64 S. Ct. 579, but it has also imposed on the representative

> a corresponding duty. We hold that the language of the Act to which we have referred, . . . read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts without hostile discrimination against them." (323 U.S. at 202-203.)

Mr. Chief Justice Stone observed that the duty of fair representation as defined above with its emphasis on the affirmative constitutional duty of the exclusive bargaining representative to protect the rights of the minority did not prevent the union from making decisions in good faith which were based on relevant differences, but that "the statutory power to represent a craft and to make contracts as to wages, hours and working conditions does not include the authority to make among members of the craft discrimination not based on such relevant differences." (323 U.S. at 203.) The bargaining representative, he further observed, was not authorized to make distinctions based upon "irrelevant and invidious" considerations. Moreover, said Mr. Justice Stone in dealing with the matter which lies at the very core of the instant litigation, that:

> "So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft. While the statute does not deny to such a bargaining labor organization the

right to determine eligibility to its membership, *it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith. Wherever necessary to that end, the union is required to consider requests of non-union members of the craft and expressions of their views with respect to collective bargaining with the employer and to give to them notice of and opportunity for hearing upon its proposed action.*" *Id.* at 204. (Emphasis added.)

There are two final aspects to the *Steele* case which are important with respect to the instant litigation.

The *Steele* complaint prayed for the following relief: an injunction against enforcement of the agreements made between the Railroad and the Brotherhood; for an injunction against the Brotherhood and its agents from purporting to act as representatives of the plaintiffs and others similarly situated under the Railway Labor Act, so long as the discrimination continued and so long as it refused to give the plaintiffs notice and hearing with respect to proposals affecting their interests; for a declaratory judgment as to their rights; and for an award of damages against the Brotherhood for its wrongful conduct. 323 U.S. at 197. The defendants argued that the plaintiff had a duty to take his complaint to the Adjustment Board. The United States Supreme Court held the argument to be without merit saying "that Board *could not give the entire relief here sought*" and that,

therefore, it could not "say that a hearing, if available, before either of these tribunals would constitute an *adequate* administrative remedy."

Furthermore, said the Supreme Court, in the absence of any available administrative remedy—that is an adequate remedy, a remedy that would give the entire relief sought, a remedy which would not mutilate the comprehensive relief of equity—"the right here asserted, to a remedy for breach of the statutory duty of the bargaining representative to represent and act for the members of a craft, is of judicial cognizance. That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction." Moreover, the Supreme Court added that it could not "say . . . that resort to such proceedings in order to secure a possible administrative remedy . . . is prerequisite to relief in equity."

The Supreme Court concluded that the breach of duty complained of in the *Steele* case "contemplates resort to the usual judicial remedies of injunction and award of damages when appropriate for the breach of that duty." In this connection it is apposite to observe that the Supreme Court at pages 203-204 had held:

> "The representative which thus discriminates may be enjoined from so doing, and its members may be enjoined from taking the benefit of such discriminatory action. No more is the Railroad bound by or entitled to take the benefit of a contract which the bargaining representative is pro-

> hibited by the statute from making. In both cases the right asserted, which is derived from the duty imposed by the statute on the bargaining representative, is a federal right implied from the statute and the policy which it has adopted. It is the federal statute which condemns as unlawful the Brotherhood's conduct. 'The extent and nature of the legal consequences of their condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted.' Deitrick v. Greaney, 309 U.S. 190, 200, 201, 60 S.Ct. 480, 485, 84 L. Ed. 694 . . .". 323 U.S. at 203-204.

The possible distinctions between *Steele* and the case at bench have been obviated by subsequent decisions. *Steele* arose in a state Court, but its companion case, *Tunstall v. Brotherhood,* 323 U.S. 210 (1944) held that similar claims could be considered by the Federal District Courts by reason of jurisdiction conferred by 28 U.S.C.A. § 41(8) (now 28 U.S.C.A. § 1337) as a case arising under a federal law regulating commerce. 323 U.S. at 213. The *Steele* case made judicially cognizable unfair representation in the negotiation and execution of collective agreements. The *Tunstall* case carried the logic one step further. It made unfair representation in the administration of a collective agreement judicially cognizable and, like the *Steele* case, provided that the remedy be both injunctive and monetary.

Decided simultaneously with *Steele* and *Tunstall* was *Wallace Corporation v. National Labor Relations*

Board, 323 U.S. 248, wherein the concepts of unfair representation were applied to the National Labor Relations Act:

> "The duties of a bargaining agent selected under the terms of the Act extend beyond the mere representation of the interests of its own group members. By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially. Otherwise, employees who are not members of a selected union at the time it is chosen by the majority would be left without adequate representation." 323 U.S. 255-256.

In *American Communications Associations v. Douds,* 339 U.S. 382 (1950), the Supreme Court relying on the *Steele, Tunstall* and other similar cases, said:

> "Under the statutory scheme, unions which become collective bargaining representatives for groups of employees often represent not only members of the union but non-union workers or members of other unions as well. Because of the necessity to have strong unions to bargain on equal terms with strong employers, individual employees are required by law to sacrifice rights which, in some cases, are valuable to them. See J. I. Case Co. v. National Labor Relations Board, 1944, 321 U.S. 322, 64 S.Ct. 576, 88 L.Ed. 762. The loss of individual rights for the greater benefit of the group results in a tremendous increase in the power of the representative of the group —the union. *But power is never without responsibility. And when authority derives in part from Government's thumb on the scales, the exer-*

cise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself." 339 U.S. at 401-402. (Emphasis added.)

Subsequently, in 1952 the Supreme Court had before it a case involving a factual pattern considerably different from that in the *Steele* case, but it held that nevertheless the principles enunciated in the *Steele* case would govern: *Brotherhood of Railroad Trainmen v. Howard,* 343 U.S. 768.

In the *Howard* case the white brakemen were organized in a union which entered into an agreement with the railroad the ultimate effect of which would be to force the replacement of Negro "porters" who were actually doing the work of brakemen by white employees. The Negro "porters" were organized in a separate union of their own. The Supreme Court pointed out that it was argued by the defendant Brotherhood that it "owed no duty at all to refrain from using its statutory bargaining power so as to abolish the jobs of the colored porters and drive them from the railroads". The Supreme Court held the argument to be unsound and held that even though the Negro porters were organized in a separate union of their own there had, nevertheless, been a breach of duty by the defendant Brotherhood. In the course of its opinion the Supreme Court said:

"Here, as in the Steele case, colored workers must look to a judicial remedy to prevent the sacrifice or obliteration of their rights under the Act. For no *adequate* administrative remedy can

> be afforded by the National Railroad Adjustment or Mediation Board. . . . *This dispute involves the validity of the contract, not its meaning.* . . . Our conclusion is that the District Court has jurisdiction and power to issue necessary injunctive orders notwithstanding the provisions of the Norris-LaGuardia Act. We need add nothing to what was said about inapplicability of that Act in the Steele case and in Graham v. Brotherhood of Firemen, 338 U.S. 232, 239-240, 70 S.Ct. 14, 18, 94 L.Ed. 22.
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> "Bargaining agents who enjoy the advantages of the Railway Labor Act's provisions must execute their trust without lawless invasions of the rights of other workers. . . . On remand, the District Court should permanently enjoin the Railroad and the Brotherhood from the use of the contract or any other similar discriminatory bargaining device to oust the train porters from their jobs." (pp. 774-775.)

In *Conley v. Gibson,* 355 U.S. 41 (1957), the Supreme Court dealt with still another of the series of cases predicated on discrimination under the Railway Labor Act. In that case Negro employees, complaining that their collective bargaining representative refused and neglected to furnish them with fair representation, sought a declaratory judgment, an injunction and damages. The Supreme Court summarized their complaint as follows:

> "A contract existed between the Union and the Railroad which gave the employees in the bargaining unit certain protection from discharge and loss of seniority. In May, 1954, the Railroad

purported to abolish 45 jobs held by petitioners or other Negroes all of whom were either discharged or demoted. In truth the 45 jobs were not abolished at all but instead filled by whites as the Negroes were ousted, except for a few instances where Negroes were rehired to fill their old jobs but with loss of seniority. Despite repeated pleas by petitioners, the Union, acting according to plan, did nothing to protect them against these discriminatory discharges and refused to give them protection comparable to that given white employees. The complaint then went on to allege that the Union had failed in general to represent Negro employees equally and in good faith. It charged that such discrimination constituted a violation of petitioners' right under the Railway Labor Act to fair representation from their bargaining agent."

The Supreme Court after pointing out that the *Conley* case was another in the series beginning with *Steele v. Louisville & Nashville R. Co.,* in which it had "emphatically and repeatedly ruled that an exclusive bargaining agent under the Railway Labor Act is obligated to represent all employees in the bargaining unit fairly and without discrimination because of race and has held that the Courts have power to protect employees against such invidious discrimination," went on to write:

"The respondents point to the fact that under the Railway Labor Act aggrieved employees can file their own grievances with the Adjustment Board or sue the employer for breach of contract. Granting this, it still furnishes no sanction for the Union's alleged discrimination in refusing to

represent petitioners. The Railway Labor Act in an attempt to aid collective action by employees, conferred great power and protection on the bargaining agent chosen by a majority of them. As individuals or small groups the employees cannot begin to possess the bargaining power of their representatives in negotiating with the employer or in presenting their grievances to him. Nor may a minority choose another agent to bargain in their behalf. We need not pass on the Union's claim that it was obliged to handle any grievances at all because we are clear that once it undertook to bargain or present grievances for some of the employees it represented it could not refuse to take similar action in good faith for other employees just because they were Negroes."

In *Gainey v. Brotherhood of Railway and Steamship Clerks,* 313 F. 2d 318, 322-323 (3rd Cir. 1963), *cert. denied,* 363 U.S. 811, the Court discussed the *Steele* rule in detail:

"The *Steele* rule is that a union which possesses the power to act for all employees of a bargaining unit has the corresponding duty to represent all the members of the unit fairly, impartially, and in good faith, without 'hostile discrimination' against any of them. Although originally employed in racial discrimination problems arising under the Railway Labor Act, the protection afforded by this doctrine has since been extended to encompass all forms of hostile discrimination. See *Ford Motor Company v. Huffman,* 345 U.S. 330 (1952); *Mount v. Grand International Brotherhood of Locomotive Engineers,* 226 F. 2d 604 (6 Cir. 1955), *cert. denied,* 350 U.S. 697;

Cunningham v. Erie R.R., 266 F. 2d 411 (2 Cir. 1959); *Hardcastle v. Western Greyhound Lines,* 303 F. 2d 182 (9 Cir. 1962).

"In order to come within its ambit, the complaint before us must have more than conclusory statements alleging discrimination. In particular, plaintiffs must make a showing that the action or inaction of the statutory representative complained of was motivated by bad faith, for the gravamen of the rule is 'hostile discrimination', an allegation that certain conduct of the brotherhood or a condition permitted to exist by it is 'invidious' and 'discriminatory' without a concomitant identification of lack of good faith, will not set forth a claim sufficient to call for the use of the *Steele* doctrine. *Hardcastle v. Western Greyhound Lines, supra* at 185-86; *Colbert v. Brotherhood of Railway Trainmen,* 206 F. 2d 9, 12 (9 Cir. 1953)."

The Third Circuit upheld the dismissal of the complaint because of the failure of the plaintiffs to allege that there was not a good faith effort on the part of the Brotherhood to alleviate the disparity in wage rates, and that the allegations of the Brotherhood's bad faith, hostile discrimination, were at most illusory. 313 F. 2d at 323.

The Court in *Gainey,* further summarized the three broad categories of cases applying the *Steele* doctrine, 313 F. 2d at 324:

"(1) racial discrimination dealing with a patent disregard and sacrifice of job opportunities and seniority rights of Negro employees for the sole purpose of benefiting white employees; e.g., *Steele*

v. Louisville and N. R.R. Co., supra; Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 232 (1949); *Conley v. Gibson, supra*;

(2) involving the arbitrary sacrifice of a group of employees' rights in favor of another stronger or more politically favored group, often in direct violation of established union practice, e.g., *Ferro v. Railway Express Agency, Inc.,* 296 F. 2d 847 (2 Cir. 1961); *Mount v. Grand International Brotherhood of Locomotive Engineers, supra; Hargrove v. Brotherhood of Locomotive Engineers,* 116 F. Supp. 3 (D.D.C. 1953); and

(3) discriminatory measures taken against an individual which sacrificed his rights for hostile and improper reasons, e.g., *Cunningham v. Erie R. R. supra; Brody v. Trans World Airlines, Inc.,* 174 F. Supp. 360 (D. Del. 1959); see also *Bohannon v. Reading Company,* 168 F. Supp. 662 (E.D. Pa. 1958). The common thread running throughout these opinions is the improper, usually bad faith, motivation for the course taken. That essential element is not present in the complaint or its collateral papers. Plaintiffs have no cause of action without it."

The *Steele* rule is not limited to cases concerning racial discrimination. Although originally employed in racial discrimination problems arising under the Railway Labor Act, the protection afforded by this doctrine has since been extended to cover all forms of hostile discrimination. *Mount v. Grand International Brotherhood of Locomotive Engineers,* 226 F. 2d 604 (6th Cir. 1955), *cert. denied,* 350 U.S. 697; *Cunningham v. Erie R. R.,* 266 F. 2d 411 (2nd Cir.

1959); including industries covered by the Labor Management Relations Act. *Ford Motor Co. v. Huffman,* 345 U.S. 330, 337 (1953); *Hardcastle v. Western Greyhound Lines,* 303 F. 2d 182 (9th Cir. 1962); *Rumbaugh v. Winifrede Railroad Company,* 331 F. 2d 530, 534 (4th Cir. 1964); *Syres v. Oilworkers International Union,* 350 U.S. 892, reversing 223 F. 2d 739; *Humphrey v. Moore,* 375 U.S. 335, 356-358 (1964) (see footnote 6 and concurring opinions of Justices Goldberg, Brennan, Douglas and Harlan).

In the *Syres* case the United States Supreme Court without even bothering to write an opinion but simply enumerating the *Steele* line of cases reversed a judgment for the defendant in the Circuit Court and ordered further proceedings in the trial Court where individual employees had brought an action against their exclusive bargaining agent and their employer, and in which they sought to enjoin the defendants and to declare void a collective bargaining agreement which violated the duty of fair representation. The Supreme Court did this in the face of strenuous objection to the effect that the employees should have brought their complaint before the National Labor Relations Board.

(1) Pleading "Hostile Discrimination".

In subsequent litigation between the parties in the *Gainey* case in the District Court, *Gainey v. Brotherhood of Railway and Steamship Clerks, etc.,* 230 F. Supp. 678 (E.D. Pa. 1964), the Court held that the plaintiffs properly stated a cause of action for "hos-

tile discrimination", with the following allegations with regard to hostility:

> "XV. The defendant union, contrary to the Railway Labor Act, is hostile toward the membership of the Philadelphia locals, where the bulk of the herein tallymen (plaintiffs) are located, because of the latter's opposition toward the General Chairman and the staff of the union's System Board and the International President and the staff of the Grand Lodge of the union." 230 F. Supp. at 682.

With regard to discrimination, the plaintiffs alleged that the railroad and union:

> ". . . acting individually and in concert by acts of omission and commission designed to discriminate against Eastern Region Talleymen so that their pay scales would be approximately twenty-five dollars a month less than talleymen employed in the Central Region of the carrier; and this discrimination was agreed upon as a means of punishing the plaintiffs and other members of the defendant union in the Eastern Region for their opposition to the Union leadership . . ." 230 F. Supp. at 682.

The Court held that the complaint contained a plain statement which gave the defendants a fair notice of the plaintiffs' claim and the grounds upon which it rested, that the defendants should answer and invoke discovery procedures. 230 F. Supp. at 682.

With regard to the requirements of pleading "hostile discrimination", see also *Conley v. Gibson,* 355 U.S. 41, 43, where the following allegations were held

to be sufficient; that the Local was the designated bargaining agent under the Railway Labor Act for the petitioner's bargaining unit; that a contract existed between the union and the Railroad which gave employees in the bargaining unit certain protection from discharge and loss of seniority; that the Railroad purported to abolish jobs held by petitioners or other Negroes, all of whom were either discharged or demoted; that these jobs were not abolished but were filled by whites; that the union, acting according to plan, did nothing to protect the petitioners against these discriminatory discharges, although it was requested to intervene on their behalf. The complaint then went on to allege that the union had failed in general to represent Negro employees equally and in good faith, and charged that such discrimination constituted a violation of petitioners' rights under the Railway Labor Act to fair representation from their bargaining agent. The complaint concluded by asking for relief in the nature of declaratory judgment, injunction and damages.

The aforementioned allegations were held by the Court in *Conley v. Gibson,* supra, to adequately set forth a claim upon which relief could be granted under the general principles laid down in the *Steele, Graham** and *Howard* cases. 355 U.S. at 45. The Court stated the general federal practice of appraising a complaint, i.e., that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can *prove* no set of

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**Graham v. Brotherhood of Locomotive Firemen,* 338 U.S. 232 (1949).

facts in support of his claim which would entitle him to relief. 355 U.S. at 45-46. The Court held that if the aforementioned allegations were proven, there had been a manifest breach of the Union's statutory duty to represent fairly and without hostile discrimination all of the employees in the bargaining unit. 355 U.S. at 46. The Court further held that

> "... collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement. A contract may be fair and impartial on its face, yet administered in such a way, with the active or tacit consent of the Union, as to be flagrantly discriminatory against some members of the bargaining unit." 355 U.S. at 46.

The defendants in *Conley v. Gibson* argued, as did the defendants in the instant case, that the complaint failed to set forth specific facts to support its general allegations of discrimination. In answer to this contention, the Court cited Fed. R. Civ. Proc. 8(a)(2) and said:

> "To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified

> 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of Rule 8(b) that 'all pleadings shall be so construed as to do substantial justice', we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. Cf. *Maty v. Grasselli Chemical Company,* 303 U.S. 197." 355 U.S. at 47-48.

We believe that the rules of pleading summarized in *Conley v. Gibson* are applicable to the case at bench, where defendants asserted in their motions that plaintiffs have not properly alleged "hostile discrimination". The complaint and the affidavit of plaintiff Stanley Weir certainly make a prima facie showing of "hostile discrimination" sufficient to bring this case within the *Steele* doctrine. In any event, the defendants could have moved for a "more definite statement" under Rule 12(e), if they believed the complaint to be vague or ambiguous, a procedure to which they resorted a number of times to the complaints filed by plaintiffs' former counsel.

> "In some instances, relief in the courts has been denied because charges of discrimination have either not been made or have clearly been

> unwarranted (citations), but where a good faith allegation of discrimination is made, specific facts in support of the general allegations need not be set forth and a court may not dismiss the suit for want of jurisdiction." *Haley v. Childers,* 314 F. 2d 610, 616 (8th Cir. 1963).

Chief Judge Sobeloff of the Fourth Circuit discussed the principles of pleading "hostile discrimination" in recent cases arising under the Railway Labor Act:

> "As this court recently had occasion to say, '(i)t is well established that, under both the Railway Labor Act and the National Labor Relations Act, 29 U.S.C.A. Section 151 et seq., a bargaining agent must fairly and without discrimination represent all employees in the bargaining unit, and that employees discriminatorily treated have recourse to the federal courts,' *Hostetler v. Brotherhood of Railroad Trainmen,* 287 F. 2d 457, 458 (4 Cir. 1961), *cert. denied,* 368 U.S. 955. Characterized as the duty of fair representation, the bargaining agent's obligation arises under the federal labor acts.
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> "Professor Summers has observed: 'The source of the union's duty to the individual is . . . its statutory power to bargain and make binding agreements which in fact govern the individual's employment.'* Initially formulated in class actions involving racial discrimination in the negotiation of collective bargaining agree-

*Summers, "Collective Power and Individual Rights in the Collective Agreement—A Comparison of Swedish and American Law," 72 Yale L.J. 421, 432 (1963).

ments, the duty of fair representation has been held to extend as well to the administration of collective bargaining agreements." *Thompson v. Brotherhood of Sleeping Car Porters,* 316 F. 2d 191, 197 (4 Cir. 1963).

". . . it appears necessary to pursue only one line of inquiry to resolve the questions of 'invidious discrimination'; 'reasonableness', 'good faith and honesty': Did the plaintiff show that he received different or substantially sub-standard representation at the hands of the Brotherhood? If so, was it because of some improper reason, such as his unsatisfactory union status? Did this treatment cause him injury? If the answers of the trier of fact to the three questions are in the affirmative, the plaintiff is entitled to relief." *Id.* at 200.

"While it is not always appropriate to transplant common law concepts to the field of labor relations, it is plain that in the Supreme Court's view the federal statutory duty of fair representation is not unlike a common law fiduciary obligation." *Id.* at 201.

See also:

Rumbaugh v. Winifrede Railroad Company, 331 F. 2d 530, 533 (4th Cir. 1964):

"Since the landmark case of *Steele v. Louisville and Nashville R. R.* (citation), the principle has become unchallengeable that the federal courts have subject matter jurisdiction to enforce the judicially-created duty imposed upon bargaining agents to represent all employees in the bargaining unit fairly and without racial discrimination."

(2) Ninth Circuit Cases

In the Ninth Circuit, three reported cases have discussed "hostile discrimination". *Hardcastle v. Western Greyhound Lines,* 303 F. 2d 182 (9th Cir. 1962), *cert. denied,* 371 U.S. 920, was an action by a number of employees who sought declaratory relief and an injunction, alleging that they were unlawfully deprived of certain seniority rights. It was alleged that after a merger of a number of bus lines, seniority was changed from a division basis to a system basis, resulting in a loss of divisional seniority for plaintiffs. Plaintiffs asserted that the new agreement, retroactively affecting their seniority, "arbitrarily, unfairly and capriciously" deprived them of their seniority rights. Plaintiffs further alleged that they were "discriminated against" and that the action by defendants was "unreasonable". Unlike the case at bench, the plaintiffs in *Hardcastle* did not allege the invalidity of the new agreement concerning seniority.

This Court upheld the dismissal of the Complaint because of a failure to allege a bad faith motive, an intent to hostilely discriminate against a portion of the union's membership. 303 F. 2d at 185. We believe that the allegations set forth in the affidavit of plaintiff Weir make a prima facie showing of "bad faith" and an intent to hostilely discriminate against a portion of the "bargaining unit". If the union representatives on the Port Committee weighed the relative advantages and disadvantages of different proposals in good faith and concluded that the plaintiffs should not have been promoted to Class "A"

and should be deregistered from the "B" list, then such facts would be a defense, e.g., *Ford Motor Co. v. Huffman, supra,* 345 U.S. at 337-338, and should be determined after a trial on the merits, rather than in a summary proceeding.

We note that this Court determined that the plaintiffs in *Hardcastle*

> "have done nothing more than present facts showing dissatisfaction with a result adopted by a majority of the union of which the appellants are members. That portions of an electorate will be dissatisfied with the result of an election is a fact inherent in the democratic process and the principle of majority rule." *Id.* at 187.

In the instant case, plaintiffs have alleged more than "dissatisfaction with a result adopted by a majority of the union." The obvious distinction, of course, is that plaintiffs in the case at bench were not members of the union and had no control over union policies, a situation similar to that of the plaintiffs in *Steele.* In addition, the plaintiffs in this case, as those in *Steele,* had no opportunity to be heard concerning the adoption of the new rules under which they were deregistered, and throughout the grievance procedure they were not advised of the specific nature of the "cause" of their deregistrations (as required by the Rules) and given an opportunity to defend themselves. The complaining parties in *Hardcastle* presented no facts in their offer of proof to the trial Court from which the Court could infer bad faith or hostile discrimination. In fact, the parties entered

into a stipulation of facts showing there was a rational basis for the selection of the date of commencement of seniority. 303 F. 2d at 188. The allegations of the plaintiffs here and in the affidavit of plaintiff Weir are replete with charges of bad faith and hostile discrimination.

In *International Longshoremen's & Warehousemen's U. v. Kuntz,* 334 F. 2d 165 (9th Cir. 1964), this Court recognized that jurisdiction in the District Court vests under § 301 in circumstances where a bargaining representative has violated its duty of fair representation pursuant to a contract.

> "As the concurrence of Justice Goldberg served to emphasize [*Humphrey v. Moore,* 375 U.S. 335, 351-359], in certain circumstances actions for breach of a bargaining representative's duty of fair representation [see *Steele v. Louisville & Nashville Railroad Co.,* 323 U.S. 192 (1944)] may be laid under § 301 if a sufficient connection between the contract and breach of duty is shown. 375 U.S. at 343. Thus, for example, if the action complained of is taken pursuant to or implemented by the contract (as here) jurisdiction may vest under § 301." *Id.* at 168.

In the case at bench, the second count alleges the administration of the contract by defendants in such a manner as to violate the duty of the union defendants to fairly represent the plaintiffs, with the rationale of *Humphrey v. Moore, supra,* and *International Longshoremen's & Warehousemen's U. v. Kuntz, supra.* We believe that the allegations of the Fourth Amended Complaint, considered with the affi-

davit of plaintiff Weir, establish "a bad faith motive, an intent to hostility discriminate" on the part of defendants, *International Longshoremen's & Warehousemen's Union v. Kuntz, supra,* at 171.

In *Alexander v. Pacific Maritime Association,* 314 F. 2d 690 (9th Cir. 1963), this Court held the National Labor Relations Board had exclusive jurisdiction over allegations that the plaintiffs' union and employer discriminated against non-union members of the bargaining unit in favor of union members. The discrimination took the form of dispensing employment and employment benefits under the collective bargaining agreement. The *Alexander* case was decided after the Supreme Court decision of *Smith v. Evening News,* 371 U.S. 195 (1962), and this Court reversed so that the plaintiffs might amend their pleadings to allege breach of contract. *Id.* at 694-95. The *Alexander* case was decided prior to *Humphrey v. Moore, supra,* and therefore did not discuss the relationship between the hostile discrimination cases and the breach of contract cases. The subsequent Ninth Circuit holding in *International Longshoremen's & Warehousemen's U. v. Kuntz, supra* at 168, did discuss the *Humphrey v. Moore* case and reached a conclusion contrary to that of *Alexander.* We submit that the holding of *Alexander* concerning jurisdiction of the National Labor Relations Board is no longer valid in light of the subsequent decisions in *Humphrey v. Moore* and *ILWU v. Kuntz.*

B. THE BREACH OF CONTRACT CASES AND §301

> "The Supreme Court has all but sounded the death knell of the theory of exclusive NLRB jurisdiction in cases arising under section 301 of the Labor-Management Relations Act."

Carey v. General Electric Company, 315 F. 2d 499, 508 (2 Cir. 1963). See: *Smith v. Evening News Assn.,* 371 U.S. 195 (1962); *Atkinson v. Sinclair Refining Co.,* 370 U.S. 238, 245 n. 5 (1962); *Local 174, Teamsters v. Lucas Flour Co.,* 369 U.S. 95, 101 n. 9 (1962); *Dowd Box Co. v. Courtney,* 368 U.S. 502, 513 (1962).

Prior to the Supreme Court's decision of *Smith v. Evening News Assn.,* 371 U.S. 195 (1962), certain activities arguably constituting unfair labor practices were held to be within the exclusive jurisdiction of the National Labor Relations Board. E.g. *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959). The *Garmon* type situation was one where state courts attempted to adjudicate controversies which "arguably" fell within the jurisdiction of the Board.

The *Garmon* rule was modified in *Local 174, Teamsters v. Lucas Flour Co.,* 369 U.S. 95 (1962) and *Dowd Box Co. v. Courtney,* 368 U.S. 502 (1962), where the Court held that state courts were not divested of jurisdiction over suits for violation of collective bargaining agreements by §301. The scope of §301 was further expanded in *Smith v. Evening News Association,* 371 U.S. 195 (1962).

In the *Smith* case the plaintiff, a member of a striking union, brought an action against his employer for breach of the collective bargaining agreement, alleging that the defendant employer, during the course of the strike, did not permit him to report for work although he was ready, willing and able to to do so, while it permitted other categories of non-union employees, employees not covered by the collective bargaining agreement, to do so even though there actually was no work available for them. The defendant refused to pay full wages to the plaintiff while making such payments to the non-union employees. The claimed violation of the collective bargaining agreement was with respect to the clause prohibiting "discrimination against any employee because of his membership or activity" in the union. The action was brought in a state court (Michigan) which dismissed "for want of jurisdiction on the ground that the allegations, if true, would make out an unfair labor practice under the National Labor Relations Act and hence the subject matter was within the exclusive jurisdiction of the National Labor Relations Board." The Michigan Supreme Court affirmed, 362 Mich. 350, in reliance upon *San Diego Building Trades Council v. Garmon,* 359 U.S. 236; *Garner v. Teamsters, etc. Union,* 346 U.S. 485; and *Weber v. Anheuser Busch,* 348 U.S. 468. The Supreme Court reversed and in doing so thereby disposed of the contentions of the defendants in this litigation not only with respect to the contention that this Court is without jurisdiction but, likewise, with respect to the con-

tention that the exclusive jurisdiction is with the National Labor Relations Board. The Supreme Court held that jurisdiction was concurrent—that the acceptance of jurisdiction by the one did not preclude the jurisdiction of the other and it went on to point out that the National Labor Relations Board was itself in accord with that conclusion (371 U.S., at 198). Mr. Justice White, writing for the Court, stressed that "Section 301 is not to be given a narrow reading" (371 U.S., at 199), and said:

> "*Lucas Flour* and *Dowd Box,* as well as the later *Atkinson v. Sinclair Refining Co.,* 370 U.S. 238, 82 S.Ct. 1318, 8 L.Ed. 2d 462, were suits upon collective bargaining contracts brought or held to arise under Sec. 301 of the Labor Management Relations Act and in these cases the jurisdiction of the courts was sustained although it was seriously urged that the conduct involved was arguably protected or prohibited by the National Labor Relations Act and therefore within the exclusive jurisdiction of the National Labor Relations Board. In *Lucas Flour* as well as in *Atkinson* the Court expressly refused to apply the preemption doctrine of the *Garmon* case; *and we likewise reject that doctrine here where the alleged conduct of the employer, not only arguably, but concededly, is an unfair labor practice within the jurisdiction of the National Labor Relations Board. The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by Sec. 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under Sec. 301.*" 371 U.S., at 197. (Emphasis added.)

This holding applies with compelling force in this action. It has received not only wide acceptance and repetition, but extensive implementation as well. Thus in *Plumbers and Steam Fitters Union, Local No. 598 v. Dillion,* 255 F. 2d 820, 823 (9 Cir. 1958), it was held:

> "The breach of contract may, as here, also be the source of an unfair labor practice cognizable by the N.L.R.B., but the District Court is not thereby deprived of jurisdiction over the private action for breach."

In *Todd Shipyards Corp. v. Industrial Union of Marine and Shipbuilding Workers, Local 39,* 344 F. 2d 107 (2 Cir. 1965), it was held:

> "The union argued below that primary jurisdiction in this case lies with the National Labor Relations Board. This argument was correctly rejected by the District Court since the federal courts have concurrent jurisdiction in actions brought under section 301 despite the fact that the wrong alleged as the substance of the action might also constitute an unfair labor practice."

In *Gilmour v. Wood, Wire and Metal Lathers International Union, Local No. 74,* 223 F. Supp. 236, the Court held that in a Section 301 action "the jurisdiction of the N.L.R.B. and of the United States District Courts are quite independent of each other" and it went on to observe that:

> "Since this is a Section 301 suit, the 'pre-emptive' doctrine of the Garmon case by which all courts, state and Federal, are divested of jurisdiction

over suits involving unfair labor practices which are reposed in the exclusive primary jurisdiction of the N.L.R.B., is inapplicable. The Court in the Smith case followed Local 174, Teamsters, etc. v. Lucas Flour Co., 369 U.S. 95, 101 at Footnote 9, 82 S.Ct. 571, 575, 7 L.Ed. 2d 593; Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 82 S. Ct. 519, 7 L.Ed 2d 483; and Atkinson v. Sinclair Refining Co., 370 U.S. 238, 245, at Footnote 5, 82 S.Ct. 1318, 1323, 8 L.Ed. 2d 462. All of these were Section 301 suits where it was held that the pre-emptive doctrine had no place. The Court expressly refused to apply the pre-emptive doctrine of San Diego Bldg. Trades Council, etc. v. Garmon, 359 U.S. 236, 79 S.Ct. 772, 3 L.Ed. 2d 775; Garner v. Teamsters, etc., Union, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228, and Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 75 S.Ct. 480, 99 L.Ed. 546. None of these latter cases was a Section 301 suit, but each involved attempts to litigate unfair labor practices as opposed to breaches of contracts in the courts."

We note that Solicitor General Cox, on behalf of the National Labor Relations Board, filed a brief *amicus curiae,* expressing the view that ousting the Courts of jurisdiction under §301 in the *Smith* case would not only fail to promote, but would actually obstruct, the purposes of the Act. 371 U.S. at 198, fn. 6. "The Board has, on prior occasions, declined to exercise its jurisdiction to deal with unfair labor practices in circumstances where, in its judgment, federal policy would best be served by leaving the parties to other processes of the law. See, e.g., *Con-*

solidated Aircraft Corp., 57 N.L.R.B. 694; *Spielberg Mfg. Co.,* 112 N.L.R.B. 1080". *Ibid.*

The *Smith* Court also noted that *Textile Workers v. Lincoln Mills,* 353 U.S. 448 has long since settled the matter that §301 has substantive content and that Congress has directed the Courts to formulate and apply federal law to suits for violation of collective bargaining contracts, for §301 is not to be given a narrow reading. 371 U.S. at 199.

Following the landmark case of *Smith v. Evening News, supra,* the Supreme Court decided *Humphrey v. Moore,* 375 U.S. 335 (1964). In that case, two employers within a multi-employer multi-union bargaining unit entered into an agreement whereby one employer would purchase the operation of the other. When the employees of the "purchased" company were laid off, they filed grievances, asserting that their seniority should carry over to the new employer. The grievants were members of the union. A local joint committee of union and employer representatives (similar to the Joint Port Labor Relations Committee) acting under authority of the collective bargaining agreement, approved a revised seniority list whereby all employees of both employers would retain their respective seniority ratings. Some employees of the "purchasing" company were laid off and filed an action in a state court, seeking to enjoin the union and the company from carrying out the decision of the local joint committee to put the new seniority list into operation. As an alternative to injunctive relief, plaintiffs prayed for damages.

Initially, the Court summarized the controlling case law in the factual situation presented there, which is similar to that of the case at bench; 375 U.S. at 342:

> "The undoubted broad authority of the union as exclusive bargaining agent in the negotiation and administration of a collective bargaining contract is accompanied by a responsibility of equal scope, the responsibility and duty of fair representation. *Syres v. Oil Workers' Union,* 350 U.S. 892; *Brotherhood of Railroad Trainmen v. Howard,* 343 U.S. 768; *Turnstall v. Brotherhood of Locomotive Firemen and Enginemen,* 323 U.S. 210; *Steele v. Louisville and N. R. Co.,* 323 U.S. 192. 'By its selection' as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially. *Wallace Corp. v. Labor Board,* 323 U.S. 248, 255. The exclusive agent's obligation 'to represent all members of an appropriate unit requires (it) to make an honest effort to serve the interests of all those members, without hostility to any . . .' and its powers are 'subject always to complete good faith and honesty of purpose in the exercise of its discretion.' *Ford Motor Company v. Huffman,* 345 U.S. 330, 337-338."

The Court further held the following allegations to be sufficient to constitute an action arising under Section 301 of the L.M.A.A.; that the union deceived the plaintiffs concerning their job and seniority rights; deceitfully connived with other employees and the International Union to deprive plaintiffs of

their employment rights; that plaintiffs were prevented from having a fair hearing before the local joint committee; that the local and international unions acted dishonestly; and that the employer was put on notice that the union was charged with dishonesty and a breach of duty. The discharge was alleged to have violated the contract. 375 U.S. at 343.

Although recognizing the differing views as to whether or not a violation of the duty of fair representation is an unfair labor practice under the Act, the Court found that it was not necessary to resolve that issue. "Even if it is, or arguably may be, an unfair labor practice, the complaint here alleged that Moore's discharge would violate the contract and was therefore within the cognizance of federal and state courts; *Smith v. Evening News Association,* subject, of course, to the applicable federal law." 375 U.S. at 344. In a footnote (fn. 6, pp. 344-345), the Court noted that the union abandoned their position in the state courts that judisdiction of the state courts had been preempted by the federal statutes, and relied upon *Ford Motor Co. v. Huffman, supra,* that individual employees "may undoubtedly maintain suits against their representative when the latter hostilely discriminates against them." The Supreme Court also noted that in *Syres v. Oil Workers International Union,* 350 U.S. 892, it reversed and ordered further proceedings in the trial Court where individual employees sued the exclusive bargaining agent and the company to enjoin and declare void a collective bargaining agreement alleged to violate the

duty of fair representation, in the face of a contention that the employees should have brought their proceedings before the National Labor Relations Board.

The Supreme Court held, on the merits, that the union took its position honestly, in good faith and without hostility or arbitrary discrimination. 375 U.S. at 350. We believe that honesty and good faith of the defendants in deregistering plaintiffs in the instant case should be determined after a trial on the merits.

Although the majority of the Court treated *Humphrey v. Moore* as a breach of contract situation arising under Section 301, we note that Mr. Justice Goldberg, with the concurrence of Justices Douglas, Brennan and Harlan, would have treated the case as one where an individual employee was suing the union for breaching its duty of fair representation, a remedy which may also be extended to the employer. 375 U.S. at 356-357.

In *Fuller v. Highway Truck Drivers & Helpers Local 107,* 233 F. Supp. 115 (E.D. Pa. 1964), the plaintiffs sought damages and injunctive relief against the implementation of the decision of a joint employer-employee committee purporting to settle certain grievances in accordance with the terms of a collective bargaining contract. It was alleged that the employers of a multi-employer bargaining group violated the collective bargaining agreement to deprive plaintiffs of their seniority standing, and that the employers conspired with union officials, without the presence or knowledge of plaintiffs, to obtain a decision by the

Joint Area Committee, based upon facts not of record, adverse to the seniority rights of plaintiffs.

In answer to the union's contentions that the Court did not have subject matter jurisdiction, the Court pointed out that the union had confused the question of jurisdiction with the question of whether the complaint states a cause of action.

> "The complaint charges a violation of the collective bargaining agreement. Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, gives this Court jurisdiction in such cases. Whether or not the claim is well founded, is another and distinct question." 233 F. Supp. at 117.

The Court also denied the union's contention that the allegations charged a violation of its duty of fair representation, "arguably" constituting an unfair labor practice and hence within the exclusive competence of the National Labor Relations Board under the rule of the *Garmon* case. It was held that plaintiffs' assertion of a violation of the collective bargaining agreement as a result of a conspiracy between the employer and the union brought the case within the holding of *Humphrey v. Moore,* 233 F. Supp. at 119.

> "Indeed, the allegations in the instant action would appear to present a stronger case for the plaintiffs than Humphrey, since, in Humphrey, the complaint did not charge employer participation in the union's breach of its duty of fair representation". *Ibid.*

The cited case of *Fuller v. Highway Truck Drivers & Helpers Local 107,* also discussed the plaintiffs' request to review the decision determining the seniority of the Joint Area Committee, a committee similar to the joint employer-union committees in the instant case. In language appropriate to the case at bench, the Court said:

> "However, plaintiffs' complaint is not directed merely to the Committee's interpretation of the contract. They assert that construction was reached as the result of conspiratorial action between Local 107 and other teamster representatives on the one hand, and [the employers] on the other. The distinction lies at the base of the *Humphrey* decision, where the complaint alleged that the decision of a Joint Conference Committee dovetailing the seniority lists of the two companies violated Moore's rights because: (1) The Joint Committee exceeded its powers under the existing collective bargaining contract in making its decision dovetailing seniority lists, and (2) The decision of the Committee was brought about by dishonest union conduct in breach of its duty of fair representation. So far as here material, the [*Humphrey v. Moore*] decision held that both grounds stated a claim under §301 of the Act." *Id.* at 118-119.

The Court also held that the plaintiffs had standing to attack the decision of the Joint Area Committee, and that the complaint stated a cause upon which relief could be granted. *Id.* at 119.

In the instant case, the plaintiffs' complaint has attacked the rules under which they were deregistered

by the Joint Port Committee (paragraphs 21, 22, 23 and 30) and that the action by the Joint Port Committee was in violation of the terms of the collective bargaining agreement (paragraph 47). In addition, plaintffs contend that the Memorandum of March 18, 1958, was violated by the deregistration procedure followed by defendants. This Memorandum was, in effect, an amendment to the contract and the rationale of the *Smith* case applies for a breach of the amendment. *ILWU v. Kuntz,* 334 F. 2d 165, 170 (9th Cir. 1964).

In another District Court case, *Regan v. Ohio Barge Line, Inc.,* 227 F. Supp. 1013 (S. D. N.Y. 1964), the plaintiffs sued the union for conspiring and acting in cooperation and collusion with the employers "in that they condoned and permitted the wrongful discharge and termination of plaintiffs' employment without proper cause, and thereby waived any rights and protections of plaintiff under the (collective bargaining) agreement . . . which rights said Union had a duty to enforce in plaintiffs' behalf" and that such activity constituted a breach of the collective bargaining agreement and plaintiffs have exhausted the remedies available to them thereunder. *Id.* at 1013-1014. The Union moved to dismiss for lack of jurisdiction.

> "The amended complaints allege a violation of the collective bargaining agreement by District 50 in asserting that District 50 failed to protect the rights of the plaintiffs under the collective bargaining agreement. *Humphrey v. Moore,* 375 U.S. 335, 341-344, is authority that under these circumstances a cause of action is spelled out under

> Section 301. Accordingly, the motion of District 50 to dismiss for lack of jurisdiction the causes of action asserted against it must be denied." *Id.* at 1014.

See *N.L.R.B. v. Pennwoven, Inc.,* 194 F. 2d 521, 524 (5 Cir. 1952) which held that a violation of a labor contract between a union and an employer is not an unfair labor practice under the statute. This holding was followed in *Fibreboard Paper Products Corp. v. East Bay U. of Mach., Local 1304,* 344 F. 2d 300, 304 (9th Cir. 1965), *cert. denied* 382 U.S. 826.

Whether we assume *arguendo* that the 1963 amendments, pursuant to which the defendants claim the plaintiffs were deregistered, were in fact legally valid and binding because properly enacted or, if we assume, as the plaintiffs do in this action, that the 1963 amendments were invalid as a matter of law and consequently of no force and effect because enacted by the defendants in violation of the union's duty of fair representation and with the connivance of PMA, then it is nevertheless claimed by the plaintiffs that the agreement was violated by reason of the following: (1) that the plaintiffs have been deregistered in violation of the clear terms of the collective bargaining agreement since that agreement does not sanction such penalty for the claimed infractions which, in any event, are, in large measure, denied by the plaintiffs and which deregistrations, moreover, were motivated by hostility and bad faith on the part of the defendants, (2) because the plaintiffs were, with hostility and in bad faith, refused and denied equality

of treatment—that they were not in fact judged by the same standards—as all other persons similarly situated and (3) because the plaintiffs were, with hostility and in bad faith, deprived of the rights and remedies embodied in the agreement for their defense against the claimed violations—that the plaintiffs were illegally and improperly deprived of those rights spelled out in the agreement involving procedural due process and equal protection. That denial involved not only initially lack of notice, particularization of charges, right of confrontation and fairness of hearing, but likewise, subsequently, promptness in the operation of the internal grievance procedures. More specifically with respect to this latter, the appeals taken by the plaintiffs were totally disregarded and ignored until the defendants, awakened by the commencement of this action, offered to proceed with the appeals. And even then, they did not do so until a month after this action was commenced.

These, stated schematically, are some of the major aspects of the violations of the collective bargaining agreement and represent the core of the third cause of action. The cited authorities leave no doubt that these constitute not only a good cause of action upon which relief may be granted, but one with respect to which these plaintiffs have properly invoked the jurisdiction of the District Court.

C. IT WAS NOT NECESSARY FOR THE PLAINTIFFS TO PRESENT THEIR CLAIMS TO THE ARBITRATOR.

The District Court held that the plaintiffs have failed to exhaust their internal remedies, that they have failed to appeal to the Coast Arbitrator, the final step in the grievance procedure, and therefore, they have no standing to bring this action.

There are several conclusive answers to this contention.

The first is predicated on the explicit language of the collective agreement which does not give the plaintiffs the right to appeal to the Coast Arbitrator. The collective agreement makes the decision of the Joint Labor Relations Committee the final step in the grievance machinery available to the plaintiffs. Section 17.261 of the collective agreement provides:

> "17.261 Any decision of a Joint Port or Joint Area Labor Relations Committee or of an Area Arbitrator claimed by either party to conflict with this Agreement shall immediately be referred at the request of such party to the Joint Coast Labor Relations Committee (and, if the Joint Coast Labor Relations Committee cannot agree, to the Coast Arbitrator, for review). The Joint Coast Labor Relations Committee, and if it cannot agree, the Coast Arbitrator, shall have the power and duty to set aside any such decision found to conflict with this Agreement and to finally and conclusively determine the dispute. It shall be the duty of the moving party in any case brought before the Coast Arbitrator under the provisions of this 17.261 to make a prima facie showing that the decision in question conflicts

> with this Agreement, and the Coast Arbitrator shall pass upon any objection to the sufficiency of such showing before ruling on the merits."

Two comments may be made with respect to this quoted paragraph of the collective agreement. (1) The defendants stressed throughout all of their papers submitted to the District Court that the Joint Coast Labor Relations Committee agreed and found against the plaintiffs on November 20, 1964. The condition, therefore, which permits an appeal to the Coast Arbitrator, namely a failure of the Coast Labor Relations Committee to agree, does not exist. (2) Even if an appeal were permitted pursuant to this Section to the Coast Arbitrator, none of the plaintiffs would be entitled to take it because, according to the quoted section, such appeal must be at the request of a "party" and the agreement in its second preamble paragraph (page 1) makes clear that an aggrieved person is not a party and that the only parties are I.L.W.U. and PMA. Only parties may select the arbitrator, Section 17.51. Specifically, the collective agreement says:

> "The parties hereto are the International of the International Longshoremen's and Warehousemen's Union and the coastwide Pacific Maritime Association."

The only time an aggrieved person has the right under the collective agreement of appealing from the decision of the Joint Coast Labor Relations Committee to the Coast Arbitrator is when his complaint is

one that falls within the terms of Section 13.1 of the collective agreement and which reads as follows:

> "There shall be no discrimination in connection with any action subject to the terms of this Agreement either in favor of or against any person because of membership or nonmembership in the Union, activity for or against the Union or absence thereof, or race, creed, color, national origin or religious or political beliefs."

But the complaint of these plaintiffs does not fall within the ambit of the quoted section of the collective agreement. Their complaint of unfair representation does not fall within it. Their complaint of discrimination does not fall within it. Each of the plaintiffs wrote a letter of appeal on or about July 27, 1963, of which the following is a sample:

> "July 27, 1963
>
> R. R. Holtgrave, Secretary
> James Kearny, Chairman
> JLRC (PMA-ILWU)
> 16 California Street
> San Francisco, California
>
> Dear Sirs:
>
> Your committee de-registered me on June 17. On July 24, I received your letter denying my hearing appeal. In so doing you consummated an action that is discriminatory. You have not judged all the men involved by the same standards.
>
> I appeal your decision and request another hearing as stipulated, where I will prove and document this discrimination.

I have never been able to get from you an official statement specifying the alleged charges against me, nor did your committee produce documents to substantiate the charges.

Would you please correct this situation for the next hearing.

Sincerely,"

The fact that the defendants *for the first time, long after this litigation was first commenced,* for their own ulterior purposes, designated the complaints of the plaintiffs as being complaints of discrimination falling within the ambit of Section 13.1, does not make them such. The complaints of these plaintiffs are governed by the second sentence of Section 17.2 which reads as follows:

"17.2 Grievances arising on the job shall be processed in accordance with the procedure hereof beginning with 17.21. Other grievances as to which there are no specific provisions herein shall be processed in accordance with the provisions hereof beginning with 17.23."

Section 17.261 which was quoted supra, is the culminating section which commences with Section 17.23. For the information of this Court those intermediate sections read as follows:

"17.23 If the grievance is not settled in 17.21 and 17.22 or does not arise on the job, it shall be referred to the Joint Port Labor Relations Committee which shall have the power and duty to investigate and adjudicate it.

"17.24 In the event that the Employer and Union members of any Joint Port Labor Rela-

tions Committee *shall fail to agree upon any question before it,* such question shall be immediately referred at the request of either party to the appropriate Joint Area Labor Relations Committee for decision.

"17.25 In the event that the Employer and Union members of any Joint Area Labor Relations Committee *fail to agree on any question before it,* such question shall be immediately referred at the request of either party to the Area Arbitrator for hearing and decision, and the decision of the Area Arbitrator shall be final and conclusive except as otherwise provided in 17.26. (Emphasis added.)

"17.26 The Joint Coast Labor Relations Committee has jurisdiction to consider issues that are presented to it in accordance with this Agreement and shall exercise such jurisdiction where it is mandatory and may exercise it where such jurisdiction is discretionary as provided in 17.261, 17.262 and other provisions of this Agreement."

There is, consequently, no basis for the claim on the part of the defendants that the plaintiffs failed to exhaust their internal remedies by appealing to the Coast Arbitrator.

The second conclusive answer to the defendants' contention is that, in point of fact, they have been denied access to the grievance machinery provided and, consequently, as a matter of law, they not only have a good and meritorious cause of action for breach of the collective agreement on this very ground but, moreover, they were under no duty or obligation

to pursue the internal grievance machinery beyond that point at which their access to it has been denied to them by the total inaction of the defendants. It may be added that when consideration is given to the entire underlying factual pattern which discloses not only that the plaintiffs were effectively denied access to the grievance machinery by the complete inaction and disregard of their appeal, but likewise also in the prior "hearings" in which all the fundamental criteria of procedural fairness were absent or refused, the conclusion becomes inescapable that such denial, that such inaction, was in bad faith, that it was but another aspect of the entire pattern of hostile discrimination by the defendants toward the plaintiffs.

The factual background which serves to support these statements has been set forth at length in the affidavit of Stanley L. Weir, one of the plaintiffs in this action, and will not be repeated here. Suffice it to note, however, that on July 27, 1963, each of the plaintiffs appealed the deregistration decision of June 17, 1963, and the affirmance of that deregistration on July 23, 1963. They each did so by identical letters, a copy of one of which has been reproduced *supra*. There was no response of any kind from the defendants or from the Joint Labor Relations Committee to these appeals. Although repeated attempts were made by the plaintiffs to learn the status of their appeals, none of them were able to obtain any information whatsoever. In fact, as the accompanying affidavit makes clear, they were informed that the decision was final and that they had no right of further

appeal. This information may well have been correct as reference to Section 17.24 of the collective agreement seems to indicate. Be that as it may, the plaintiffs attempted to obtain action on their appeals of July 27, 1963, and they waited nearly nine months with that hope until on April 14, 1964, they finally instituted this action. The entire period between the time the plaintiffs filed their appeals on July 27, 1963, until the commencement of this action was marked by the refusal of these defendants, through their instrumentality, the Joint Labor Relations Committee, to take any action whatsoever on the pending appeal. These facts, we respectfully submit, leave no other conclusion possible than that the defendants, by failing and refusing to process the appeals by the plaintiffs have effectively denied to the plaintiffs access to the internal grievance machinery.

In *Born v. Cease,* 101 F. Supp. 473, 475, the Court aptly held:

> ". . . the proceedings governing appeals within labor unions . . . should be 'plain, speedy and adequate'. The plaintiff had no appeal within the union in the true sense of the word . . ."

Certainly there was nothing "plain, speedy and adequate" about the internal grievance procedures here involved. And adequacy along with promptness are the key factors to be considered. In the leading case recently decided by the United States Supreme Court, *Republic Steel Corporation v. Maddox,* ..... U.S. ....., 85 S.Ct. 614, 13 L.Ed. 2d 580, these considerations form the crux of the ruling. In that case,

the plaintiff made no effort whatsoever to utilize the grievance machinery provided and Mr. Justice Harlan writing for the Court therefore reversed an Alabama State Court judgment in his favor. In the course of doing so, Mr. Justice Harlan said:

> "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress. If the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available. See Humphrey v. Moore, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed. 2d 370; National Labor Relations Board v. Miranda Fuel Co., 2 Cir. 326 F. 2d 172. But unless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf." (85 S.Ct. at 616; emphasis in original.)

Moreover, added the Supreme Court:

> "And it cannot be said in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so."

We submit that in the instant case there can be no doubt that the plaintiffs did attempt to use the contract grievance procedure, that the union not only refused to assist them but, in fact, acted as their prosecutors and that the plaintiffs found those procedures inadequate to protect their interests after a

strenuous attempt to implement them. *Republic Steel Corporation v. Maddox,* therefore, entirely and unequivocally supports the position of the instant plaintiffs. A host of other authorities equally sustain the position of the plaintiffs.

In *Booth v. Security Mutual,* 155 F. Supp. 755, 762, it was held:

> ". . . defendants raise the objection that the union constitution and by-laws present channels through which the plaintiffs must first seek to obtain their rights before resort to the courts. To this it need only be said that two years of inaction by the union and its high officials in taking any steps against those primarily responsible . . . make it apparent that any such intra-union remedy is presently without avail. Doubtless, it is for that very reason that the plaintiffs have filed the present suits."

In *Flaherty v. McDonald,* 178 F. Supp. 544, which was an action by officers of a local union demanding that control of the local be returned to its elected officers by the International Union, the Court held:

> "As a general rule one of the contracting parties cannot ignore portions of a contract and yet insist the other party live up to its terms. The contract is binding on all parties or on none. In this particular case, International disregarded its contractual obligation relative to charges and trials of Local officers. It appears to the Court that International is in poor grace when it insists that it can disregard that portion of the Constitution relative to charges and trials and yet insist that those who have been deposed by International's

> action, contrary to its own Constitution, will have to take an appeal in compliance with the terms of the Constitution before having recourse to the courts. '. . . he who demands the protection of the constitution should in the first instance give that protection.' Underwood v. Maloney, D.C., 152 F. Supp. 648 at page 667." 178 F. Supp. at 550.

The opinion in *Flaherty v. McDonald* emphasized further:

> "Time is of the essence in this matter. . . . If plaintiffs are to have any relief at all from the administrative remedies, that relief must be prompt." 178 F. Supp. at 550.

Moreover, the Supreme Court made clear in *Textile Workers Union v. Lincoln Mills of Alabama,* 353 U.S. 448, that it is the duty of the federal Courts to fashion a body of substantive federal law from "the penumbra of express statutory mandates" and that "the substantive law to apply in suits under Section 301(a) is federal law, which the courts must fashion from the policy of our national labor laws". In this connection our national labor laws do give more than an indication of what Congress deems a reasonable period of time beyond which it is improper to require the exhaustion of internal remedies. The Labor Management Reporting and Disclosure Act of 1959 provides (29 U.S.C., Sec. 411(a) (4)) that, "any such member may be required to exhaust reasonable hearing procedures (but not to exceed *a four-month lapse of time)* within such organization, before instituting

legal or administrative proceedings against such organizations or any officer thereof." (Emphasis added.)

Certainly the eight and three-quarter month period of deliberate inaction on the part of these defendants before the commencement of this litigation is unreasonable and when considered in connection with the entire course of conduct of the defendants prior thereto, denying as it did every semblance of fairness in the operation of the grievance machinery, must be deemed an absolute denial of access to the internal grievance machinery provided.

In the leading case of *Detroy v. American Guild of Variety Artists,* 286 F. 2d 75 (2nd Cir. 1961) *cert. den.,* 366 U.S. 929, the Court in dealing with the four-month exhaustion period provided under Section 101 of Landrum-Griffith pointed out in language applicable here that:

> ". . . the proviso dictated an outside limit beyond which the judiciary cannot extend the requirement of exhaustion—no remedy which would require proceedings exceeding four months in duration may be demanded. We, therefore, construe the statute to mean that a member of a labor union who attempts to institute proceedings before a court or an administrative agency may be required *by that court or agency* to exhaust internal remedies of less than four months' duration before invoking outside assistance." 286 F. 2d at 78. (Emphasis in original.)

The opinion then continues:

> "Section 102, under which the appellant instituted his proceeding, provides for enforcement

by federal courts of rights assured by federal law. We are not in this case, therefore, bound by the doctrine of exhaustion as developed in the New York, Nevada, or California courts with respect to suits against unions brought in the courts of those states by union members. In enforcing rights guaranteed by the new statute, whether or not similar rights would be enforced under state law by state courts, the federal courts may develop their own principles regarding the time when a union's action taken in violation of Sec. 101 is ripe for judicial intervention. Cf. Holmberg v. Armbrecht, 1946, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743; Sola Electric Co. v. Jefferson Electric Co., 1942, 317 U.S. 173, 176-177, 63 S.Ct. 172, 87 L.Ed. 165. The rules formulated by various state courts may suggest helpful avenues of approach, cf. Textile Workers Union of America v. Lincoln Mills, 1957, 353 U.S. 448, 457, 77 S.Ct. 912, 1 L.Ed. 2d 972, but the authority granted to the federal courts by Congress to secure the rights enumerated by Sec. 101 of the 1959 Act is accompanied by the duty to formulate federal law regarding a union member's obligation to exhaust the internal union remedies before seeking judicial vindication of those rights."

Moreover, said the Circuit Court in the *Detroy* case:

"If we look to the substantial body of state law on the subject, we find that the general rule requiring exhaustion before resort to a court has been almost entirely swallowed by exceptions phrased in broad terms. . . .

"The Congressional approved policy of first permitting unions to correct their own wrongs is

> rooted in the desire to stimulate labor organizations to take the initiative and independently establish honest and democratic procedures. . . . Other policies, as well, underlie the exhaustion rule. The possibility that corrective action within the union will render a member's complaint moot suggests that, in the interest of conserving judicial resources, no court step in before the union is given its opportunity. . . . See Summers, The Law of Union Discipline: What the Courts Do in Fact, 70 Yale L.J. 175, 207 (1960). Congress has provided a safeguard against abuse by a union of the freedom thus granted it by not requiring exhaustion of union remedies if the procedures will exceed four months in duration. But in any case, if the state of facts is such that immediate judicial relief is warranted Congress' acceptance of the exhaustion doctrine as applied to the generality of cases should not bar an appropriate remedy in proper circumstances."

We have shown the manifest improprieties in the proceedings involving the deregistration of these plaintiffs even long prior to the taking of their appeal on July 27, 1963. We have shown that the "hearings" granted them were largely a farce, that they were not furnished with statement of the charges against them, that they were asked to defend themselves without being given the particulars upon which they could formulate a defense, and that they were denied not only counsel but any assistance including representation by their ostensible bargaining representative, the union defendants. These facts, by their very recitation, reveal such a violation of their rights as makes

inapplicable any requirement that they further exhaust internal remedies since, at every stage up to the time they took their abortive appeal, the evidence demonstrates the violation of their rights under the collective agreement and the predetermination in the minds of those who would, under the internal remedies provided, pass upon the appeal.

The remark in Summers, Union Powers and Workers' Rights, 49 Mich. L. Rev. 805, 820 (1951), is apposite in this connection:

> "The rights which a worker should have in the union which acts as his economic government are essentially the rights of a citizen in a democratic state. . . . Most important is the right to participate fully and freely in making the laws under which he lives. *If this right of an individual worker within his union is not protected, then collective bargaining has not brought him freedom but an additional master.*"

In *Nelson v. Johnson,* 212 F. Supp. 233, which was a case brought by union members against the president and treasurer of a local union under Landrum-Griffin alleging that the defendants violated the act in failing to hold money and property solely for the benefit of the union and expended in accordance with the union's constitution, by-laws and resolutions. The Court said at page 255:

> "Can the national governing body of a union discourage resort to the federal courts when internal redress for patent federal wrongs has proven futile in the past? The answer is no."

In *Parks v. International Brotherhood of Electrical Workers,* 314 F. 2d 886 (4th Cir., 1963) *cert. den.,* 83 S.Ct. 1111, it was said at pages 924-925:

> "Although there is a common law doctrine that parties are not entitled to judicial relief until they have exhausted intra-union remedies, there are a number of well-recognized exceptions. . . . Exceptions are recognized when resort to the internal appeal would be unreasonably burdensome because of delay likely to result in irreparable injury."

The Court in the *Parks* case stated further, at page 925, that:

> ". . . section 101 (a) (4) . . . provides an authoratative expression of Congressional labor policy, it is, insofar as it may modify the common law exhaustion doctrine, a prime source upon which the court should draw in formulating the federal law. . . ."

It, thereafter, added at page 925:

> "The four-month limitation in the proviso has been subjected to various interpretations. We agree, however, with the District Court's conclusion that 'whatever construction is placed' on this proviso (203 F. Supp. at 296), these suits are barred neither by the statutory limitation nor by common law exhaustion doctrine. When these suits were brought, all internal remedies, available within four months of revocation, had been exhausted. To insist upon full exhaustion of remedies would be to impose an unreasonable delay in the adjudication of plaintiffs' rights and would result in irreparable harm to plaintiffs."

In *Gainey v. Brotherhood of Railway & Steamship Clerks,* 313 F. 2d 318 (1963), the Court said at page 322:

> "The use of the word 'decision' would indicate that the Grand President must dispose of the issue before an aggrieved member could go on to the Council. There is nothing in the Brotherhood governing laws which gives the plaintiffs a right to appeal from the inaction of the Grand President: on the contrary, the entire appellate procedure is predicated on the existence of a decision at each stage. In view of the fact that plaintiffs were effectively stopped from obtaining a final union disposition of their grievance and having very much in mind the time element involved we find that the allegations in their complaint make an adequate representation that they have taken all reasonable steps available to them within the Brotherhood's internal structure."

In a case where the administrators of an estate alleged that decedent was unlawfully discharged by his employers with the knowledge, consent and connivance of the union and deprived of certain benefits in violation of the collective bargaining agreement, the Second Circuit held as follows with regard to the arbitration provisions of the contract:

> "It is true that the collective bargaining agreements contain arbitration clauses and that if this were simply a suit for wrongful discharge, the arbitration clauses would be available to the employers as a defense. (citations)) *But where the employee's case is based upon a conspiracy between his union and his employer to deprive him of his rights, he cannot be forced to submit that*

issue to an arbitration between the employer and the union. Such a procedure would fail completely to settle the issues between the union member and his union. It would entrust representation of the employee to the very union which he claims refused him fair representation, and it would present as adversaries in the arbitration procedure the two parties who, the employee claims, are joined in a conspiracy to defraud him.

"That (District) Judge Bryan had misgivings along the lines we have indicated is evidenced by his having included in his order (staying the action pending arbitration) provision for the plaintiffs to have separate representation at the arbitration and a voice in choosing the arbitrator. However, the arrangement fails to cure the defects, since the plaintiffs would still be aligned on the side of their adversary, the union, or, if not, the order would have to be construed as forcing the plaintiffs to arbitrate issues with employer and union which neither they nor their decedent ever agreed to arbitrate." *Hiller v. Liquor Salesmen's Union Local No. 2,* 338 F. 2d 778, 779-780 (2nd Cir. 1964). (Emphasis added.)

Finally in *Samsing v. S & P Company,* 325 F. 2d 718 (1963), the Court of Appeals for the Ninth Circuit in a Per Curiam opinion held:

"Appellant brought suit under Section 301 of the Labor-Management Relations Act, 1947 (29 U.S. C.A. Sec. 185(a) to recover wages and other benefits allegedly due under a collective bargaining agreement. The District Court dismissed the complaint on the ground that it appeared from the complaint and attached agreement that the

appellant had not exhausted his administrative remedies.

"The collective bargaining agreement simply set out the administrative procedures to be followed in settling grievances. The complaint alleged that 'plaintiff has exhausted all of the administrative remedies provided for in said labor agreement or he has attempted to so comply.' Appellee asserts that this allegation is to be ignored as 'a mere conclusion, wholly uninformative as to what he claimed to have done to comply or attempt to comply.' We think it was sufficient to withstand a motion to dismiss, for 'the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.' Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99, 102-103, 2 L.Ed. 2d 80 (1957)."

D. JURISDICTION OVER THE INDIVIDUAL DEFENDANTS

The District Court did not specifically rule on whether or not it had jurisdiction over the individual defendants, although this issue was raised by defendants. Plaintiffs contend there was pendent jurisdiction over the individual defendants.

"Pendent jurisdiction became firmly embedded in federal law by the decision of the Supreme Court in *Hurn v. Oursler,* 289 U.S. 238 (1932), which has been cited and relied on many times by the federal courts. . . . Under *Hurn,* piecemeal adjudication of a claim by different courts was eliminated. When a substantial federal claim is asserted, the federal court has jurisdiction to

> fully determine it, including its local aspects. The federal and state claims are regarded merely as different grounds to support a single cause of action. (citation). This permits an award of punitive damages where authorized by state law. (citation)." *Price v. United Mine Workers of America,* 336 F. 2d 771, 775 (6 Cir. 1964), *cert. denied,* 380 U.S. 913.

California state law recognizes the tort of intentional interference with a contractual relationship, *Herron v. State Farm Mut. Ins. Co.,* 56 Cal. 2d 202, 205, 14 Cal. Rptr. 294 (1961), the basis of the fourth and fifth causes of action of the complaint.

A recent case discussing this problem in a labor context was *Mine Workers v. Gibbs,* 383 U.S. 715, 725-27 (1966). See an extensive note on this subject in 5 ALR 3rd 1040.

See also *Sidney Wanzer & Sons, Inc. v. Milk Drivers U. Local 753,* 249 F. Supp. 664 (N.D. Ill. 1966). This was an action by an employer against the union and individual union officers. The Court held there to be jurisdiction for actions against individuals (at p. 668) and a remedy of exemplary damages (at p. 671) under § 301.

E. THERE WAS NO EXPIRATION OF ANY STATUTE OF LIMITATIONS

As noted throughout this brief, a period of eight and three quarter months elapsed between the deregistrations of plaintiffs and the filing of this action.

The District Court, in holding that the applicable statute of limitations had expired, apparently applied the six month period of Section 10(b) of the Act, which specifically applies to unfair labor practice charges. The Act is silent with regard to other actions which may be brought thereunder.

The statute of limitations for actions brought under Section 301 is to be determined by state law. *Auto Workers v. Hoosier Corp.,* 383 U.S. 696 (1966). This rule was applied last year by this Court in *International U. of Op. Eng. v. Fishbach & Moode, Inc.,* 350 F. 2d 936 (9th Cir. 1965).

A similar rule has been adopted by the Wisconsin Supreme Court which refused to invoke "judicial inventiveness" to make the six month limitation specified for unfair labor practices applicable to breach of contract actions. *Tully v. Fred Olson Motor Service Co.,* 27 Wis. 2d 476, 134 N.W. 2d 393 (1965).

The statute of limitations in California is four years on a written contract (California Code of Civil Procedure, § 337, subd. 1), two years on a contract not in writing (Code of Civil Procedure, § 339, subd. 1), and one year for liability created by a statute (California Code of Civil Procedure, § 340, subd. 1). There was no expiration of any of these applicable statutes, and plaintiffs' action, filed within nine months of the wrongful acts of defendants, was timely.

F. THERE WERE GENUINE ISSUES OVER MATERIAL FACTS RAISED BY THE AFFIDAVITS OF THE PARTIES.

The affidavits submitted by defendants were directed toward the issue of "cause" for the plaintiffs' deregistrations. Defendants alleged that plaintiffs were deregistered pursuant to rules and regulations which were violated by plaintiffs. The affidavit of plaintiff Weir, and the other documents submitted by plaintiffs, denied that they were guilty of any violations and challenged the very existence of any rules authorizing these deregistrations. The allegations of Mr. Weir concerning threats and intimidations from union officials because of his leadership of the B men and his open criticism of the policies of the P.M.A. and I.L.W.U. are uncontroverted in the record. The evidence that B men were deregistered for offenses while A men were given only nominal punishment (if any) for the same and more aggravated offenses is also uncontradicted. Plaintiffs' version of the entire deregistration proceedings indicates a denial of industrial due process which

> ". . . would effectively undermine the decision of the Joint [Port Labor Relations] Committee as a valid basis for . . . [plaintiffs'] . . . discharge." *Humphrey v. Moore,* 375 U.S. 335, 343.

From the above examples, we submit that these were issues which should not have been determined in summary fashion.

V

CONCLUSION

For the foregoing reasons, this matter should be reversed and remanded to the District Court for a trial on the merits.

Dated, San Francisco, California,
September 1, 1966.

Respectfully submitted,
IRVING A. THAU,
FRANCIS HEISLER,
ARTHUR BRUNWASSER,

By ARTHUR BRUNWASSER,
Attorneys for Appellants.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ARTHUR BRUNWASSER,
Attorney for Appellants.

(Appendix Follows)

Appendix

Appendix

In the United States District Court for the Northern District of California,
Southern Division

No. 42,284

George R. Williams, et al.,
Plaintiffs,

vs.

Pacific Maritime Association, a non-profit corporation; International Longshoremen's and Warehousemen's Union, an unincorporated association, et al.,
Defendants.

AFFIDAVIT OF STANLEY L. WEIR IN OPPOSITION TO MOTIONS TO DISMISS

State of California
City and County of San Francisco—ss.

Stanley L. Weir, being duly sworn, deposes and says:

I am one of the plaintiffs in the above-entitled action. I make this affidavit in opposition to the several motions now before this Court, made by the defendants pursuant to Rule 12 of the Federal Rules

of Civil Procedure, which seek a dismissal of the Fourth Amended Complaint.

I was registered by the San Francisco Joint Port Labor Relations Committee on June 1, 1959, pursuant to the terms of an amendment to the then existing collective bargaining agreement. The amendment is entitled "Memorandum of Rules Governing Registration and De-Registration of Longshoremen in the Port of San Francisco", dated March 18, 1959. A photostatic copy of this Memorandum is annexed to the Fourth Amended Complaint as Exhibit "A" and will hereinafter be referred to as the 1958 Memorandum. I was summarily de-registered on June 17, 1963, by the San Francisco Joint Port Labor Relations Committee without prior notice, without specification of purported charges and without any opportunity to be heard allegedly pursuant to the terms and provisions of Section 9 of the 1958 Memorandum.

It is my contention that I was de-registered by the Joint Port Labor Relations Committee in violation of the express terms, conditions and provisions of the 1958 Memorandum; that I was not afforded, and the defendants wilfully refused and denied me, the benefit of the provisions therein contained (and, likewise, those contained in the basic collective agreement, the Pacific Coast Longshore Agreement: 1961-1966) respecting procedural due process and equal protection; that in every basic respect I was denied and refused by the union defendants the fair representation to which I am entitled both under the collective agreement and as a matter of law; that the defendant

PMA actively participated in that denial and refusal of fair representation by the union defendants; that I am not, in fact, guilty of any infraction of the rules which governed my conduct as a Class "B" longshoreman which I *infer* are charged against me by the Joint Port Labor Relations Committee; that I am only able *to infer* what those charges may be because at no time prior to my de-registration was I furnished with the particulars of the alleged charges against me by the Committee notwithstanding the fact that I made both oral and written demands therefor; that for reasons which will become clear hereinafter I am still not certain precisely what alleged charges there were against me, if any, at the time of my de-registration; that I have been denied equality of treatment with all other Class "B" longshoremen similarly situated; and that, finally, my de-registration was the outcome of hostility, malice and bad faith on the part of the defendants.

I recognize that the statements I have just made are, to a certain extent, merely conclusions. However, I represent to this Court that I shall in the balance of this affidavit (and, of course, ultimately on the trial of this action) demonstrate the underlying facts which compel these conclusions and to satisfy this Court with respect to their truthfulness.

During the latter half of 1962, the Class "B" longshoremen were informed by officials and representatives of the union defendants that, very shortly, the "freeze" which had been imposed early in 1960 on the promotion of Class "B" longshoremen to Class

"A" would be rescinded and that, upon its occurrence, the Class "B" longshoremen would rapidly be moved into the Class "A" category. The lifting of the freeze actually occurred soon thereafter, and by February of 1963 the procedures for such transfers were underway.

The first notice to the Class "B" longshoremen that the procedures were actually in motion came with notification that the defendant, Local No. 10, was conducting an investigation of our eligibility for membership in the union. (We were told to pick up, complete and execute application forms for membership in the union.) I received such notification in the form of an undated letter approximately a week prior to February 26, 1963. The letter to me, on the stationery of Local No. 10, reads as follows:

> "Please be advised that it will be necessary for you to appear before our Investigating Committee to be investigated for possible membership in the Union.
>
> The meeting will be held on FEB 26, 1963 at 7 p.m. You are to report to the lobby of the Union office, 400 North Point Street, San Francisco.
>
> Please bring your local 10 Class 'B' Book with you and make the following records available to the Committee if you have them:
>
> 1. Previous membership in any union
> 2. Strike records
> 3. Withdrawl (sic) cards
>
> You will have to come in to the Union Office before the above meeting and file your applica-

tion, which is enclosed, and also deposit the sum of $10.00 which shall be the initiation fee.

Membership action of March 7, 1960.

M/S/C That all new 'B' members are required to pay the current building payments when initiated.

This means that the total sum paid by 'A' members to date prior to your initiation is $216.00"

On February 26, 1963, I appeared before the Investigation Committee of Local No. 10 as directed.

Parenthetically, I believe it important to emphasize that this was an investigation to determine my eligibility for union membership, not for transfer to Class "A" status. There is no closed shop. There are, in fact, Class "A" longshoremen who are not members of the union. The two categories are not identical.

When I appeared before the Investigating Committee of Local No. 10, I observed that its Chairman that evening was Carl Smith, that there were two Sargeants of Arms, Odel Franklin and Benny Hunter, and that there were also present, among others, one Anderson, a gang boss, whose first name I do not know, Dave Littleton, John Rutter and Thomas Silas. The latter, Thomas Silas, although present was not a member of the Investigating Committee. I was asked initially to hand over my completed and executed application for membership in the union in duplicate which, among other things, provided that the appli-

cant agreed thereby to work in the hold, that is, at the most demanding, taxing and difficult longshore work, for an additional period of five years if admitted into the union.* I was then asked for my records in other unions and related documents, which after being examined and found to be unobjectionable, were returned to me. I was thereupon told I was clear for union membership. I was told this after John Rutter had announced to the Committee that the only possible violation he had discovered against my record was that I had dropped four hours in low-man-out violations in 1962. No date was specified for these possible violations, and since they, in any event, were within

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*The Memorandum of 1958 contained provisions with respect to the relative seniority of Class "A" longshoremen, Class "B" longshoremen and casuals. In Section 1 the Memorandum of 1958 states:

"Section 1. *Seniority Groups.*

Longshoremen employed shall fall in the following categories:

A. Registered Longshoremen.

B. Limited Registration Longshoremen.

Other workers doing longshore work (Social Security men) are casuals and have no seniority rights or registration status."

These provisions respecting seniority receive part of their practical application in the "Rules and Regulations Governing Low-Man-Out System of Dispatch for Individual Longshoremen" of December 30, 1958, adopted by the San Francisco Port Labor Relations Committee (hereinafter referred to as Low-Man-Out Rules). For this Court's information, a true copy of these Low-Man-Out Rules are hereto annexed, made part hereof and marked Exhibit "A". The significance of the agreement the union sought from each prospective Class "A" applicant with respect to the condition requiring the applicant to work five years longer in the hold, is that the union sought, unilaterally and in spite of the terms of the collective agreement, to create, even among the Class "A" men, a five-year category of second-class "citizenship", so to speak. This is a salient matter which will, in view of certain facts to be related hereinafter, take on even greater importance when integrated with those matters to be discussed hereinafter.

the ten-hour allowable limitation, I was clear. I was about to be dismissed when Thomas Silas approached John Rutter and handed him one or more slips of paper. After looking at them, John Rutter said, in substance, "Wait a minute. Silas says that you have some other low-man-out violations and that altogether your total low-man-out violations are thirteen and one-half hours. That is more than the ten-hour allowable limit. You are not clear." I asked for the dates of such violations. I said that I did not have any such violations, that I had my records with me and that, if they gave me the specific dates the violations were supposed to have occurred, I was prepared, then and there, to defend myself and demonstrate that the charge was baseless in all respects. The Chairman, Carl Smith, then told me that as of that evening they had changed their procedural rules, that they were not permitting anyone to defend himself before the Committee that evening, and that I could, by going to the records checker's office at 400 North Point Street, the following morning, do so there. I then said to the Chairman, "Is there any procedure for returning here, after I clear myself at the records checker's office tomorrow?" John Rutter then spoke up and said, "I am the records checker. If you clear yourself with me tomorrow morning, I'll see to it that you get back here." It was then that I was dismissed by the Investigating Committee.

At nine o'clock the following morning, when the records checker's office opened, I was there. John Rutter and Odel Franklin were both present. I spoke

to Rutter and asked him to get my records together in order that we might go over them. He was visibly embarrassed but finally said that he was going to let the man who had been *specially* handling my case do that. He then picked up the phone and spoke to Thomas Silas and asked him to come over to the office. I waited and finally Silas arrived and got my records together. He first accused me of dropping six hours on the low-man-out system on April 23, 1962. I pointed out to Silas that this did not represent a violation on my part, that it represented an error on the part of the dispatcher and that when I discovered the error a day or two later, I took it up with the dispatcher and the error was corrected. Silas turned to the pages for the following days and, indeed, found what I told him was in fact true. He then said, "Well, that eliminates that charge." He then presented me with a charge that I had a two-and-one-half hour violation on either May 2nd or 3rd of 1962. I then went over that charge with him in detail and showed him that it again represented a mere bookkeeping error which was discovered shortly after it occurred and that it was immediately corrected after its discovery. He thereupon went over the records and agreed that the charge was unfounded. He then said to me, "Well, that eliminates that charge, too. You will hear from us by mail." I then said, "Wait a minute. Last night you accused me of thirteen-and-one-half hours of violations. Let us go through the other five hours you accused me of and see if they exist." Odel Franklin, who had been

listening, interjected himself and said, "Yeah, you might as well get them all while you are at it." But Silas, after saying that it was not necessary to check the others since they were less than ten hours, finally admitted that he had nothing further. I then became angry and said, in effect, "What is going on here? Even if I had been guilty of the eight-and-one-half hours of violations which you took up with me this morning and which I showed you didn't exist, I would have still passed last night since the allowable number was ten. Why did you accuse me of thirteen-and-one-half hours?" Silas did not reply.

While this was going on between Silas and me, the Secretary-Treasurer of Local No. 10, Reino Erkilla, was present on some other business but was listening to the entire conversation. He, too, became irritated at the obvious frame-up that had occurred and turned to Silas and said, "Is this man clean or isn't he?" Silas said that I was but that he had no power to change the decision of the Committee. Only the Committee could change its own decision. I said, "Why don't you cite me for tonight? The Committee is meeting and I am available." Silas replied, "No, we can't do that, but we will notify you by mail." Mr. Erkilla then said, "Well, for what date are you going to cite him?" Odel Franklin said it would be done for the following Monday evening and Silas replied that that would be a proper time. I left the records checker's office at this point.

A day or two later I received another undated letter from Local No. 10, identical with the first, but

calling for my appearance before the Investigating Committee on the evening of March 4, 1963. A photostatic copy of that letter is hereto annexed as Exhibit "B". I appeared as directed. When I arrived, I found that Odel Franklin was in charge of scheduling the order of the appearance of the men before the Committee. He said to me that I was not on the agenda for that evening. I asked him why not and showed him my letter calling for my appearance. He said, "I'll go in and talk to the Committee and see what they want to do about it." He came out a few minutes later and told me that the Committee was not going to see me; that instead they had passed a procedural motion that evening to the effect that they would not see any applicant whom they had previously interviewed. I did not go before the Committee that evening nor was I ever permitted to do so thereafter. I, therefore, wrote the following letter to Mr. James Kearny, the President of Local No. 10:

"1720 Buena Avenue
Berkeley, 3, California
March 8, 1963

Mr. James Kearny
500 Northpoint Street
San Francisco, California

Dear Brother Kearny:

I am writing this letter to ask for your help in clearing my name. At last night's Local 10 meeting the International President, Harry Bridges, made it very clear that the Local's Investigating Committee has rejected the men it considered chiselers, dues delinquents, and contract violators.

I cannot disagree, but the Committee can make mistakes as was pointed out in the meeting.

At least one mistake was made that I know of. They rejected me for chiseling thirteen and one-half (13½) hours, or three and one-half (3½) over the allowable in the April-May period of last year.

The next morning, as requested, I went to the Union Record Checkers to clear myself. Their records showed nine (9) hours. While this was less than the allowable ten (10) hours, I showed that even this number was in error.

In spite of this my case was sent to another and higher committee that handles men who didn't pass. I was not given a chance to prove my innocence to the Local 10 Investigating Committee as I had been promised.

I want the chance to clear myself and correct the mistake before the Investigating Committee so that I can be registered along with the other men who were able to meet that Committee's standards.

Fraternally,
Stanley Weir #80524"

This letter which was sent to Mr. Kearny by registered mail never evoked a response or acknowledgment. I could obtain no further information as to my status even though I repeatedly inquired, except that the entire matter was in the hands of the Joint Port "B" Labor Relations Committee of which John Trupp of PMA and William Chester of Local No. 10 were the joint co-chairmen. Finding my search for infor-

mation frustrated in every direction, I finally on May 14, 1963, sent identical telegrams to both Trupp and Chester in their capacities as joint co-chairmen of the Committee. These identical telegrams read as follows:

> "DEAR SIR THIS IS TO AVOID ANY POSSIBILITY OF A MISTAKE I HAVE BEEN INFORMED BY LOCAL UNION OFFICIALS THAT YOUR COMMITTEE MAY STILL HAVE ME LISTED WITH THE SAME LMO VIOLATIONS THAT I WAS CHARGED WITH LAST FEBRUARY 26. SUBSEQUENT TO THAT DATE IT HAS ADMITTEDLY BEEN ESTABLISHED THAT THE CHARGE WAS IN ERROR. I KNOW THAT YOU CANNOT AGAIN TAKE ANY PRECIPITOUS ACTION WITHOUT CHECKING THIS ERROR.
>
> IF THERE ARE OTHER CHARGES I REQUEST THAT I IMMEDIATELY BE NOTIFIED, CONFRONTED, AND TRIED FOR THEM SO THAT THERE WILL BE NO DELAY IN MY OBTAINING UNION MEMBERSHIP AND A REGISTRATION ALONG WITH THE OTHER B REGISTERED MEN WHO HAVE QUALIFIED FOR SAME."

Again I waited nearly a month and received neither response nor acknowledgment. Again I found all doors closed to me in my quest for information. Consequently, on June 10, 1963, I sent duplicate copies of the following letter to Mr. Holtgrave and Mr. Kearny:

"1720 Buena Avenue
Berkeley 3, California
June 10, 1963

Mr. R. R. Holtgrave, Secretary
Joint Port Labor Relations Committee
c/o Pacific Maritime Association
16 California Street
San Francisco, California
and
Mr. James Kearny, Chairman
Joint Port Labor Relations Committee
c/o ILWU
400 North Point Street
San Francisco, California

Dear Sirs:

By this letter I am again attempting to avoid any possibility of a mistake being made in my case. Time and events may have blurred the facts.

On February 24 of this year I was called before the Union Investigating Committee as was proper since I had been cleared by your committee for A status. In that interview I was told I had an absolutely clear record except for the fact that I had chiseled some hours.

From documents produced at that time by T. Silas, I was told I was guilty of chiseling 13½ hours, or 3½ hours over the amount that would allow me to pass.

I was not allowed to prove my innocence before the committee. I was instructed that I could attempt to do so by going to the Record's Checker in the Joint Records Office at 400 North Point

Street, San Francisco, at any future date; and that if I was able to do this successfully that I would be notified to again come before the committee.

I appeared at the Records Office eleven hours later. (February 25, 9 a.m.). From his check of my records Mr. Silas presented me with dates on which I was said to have dropped six (6) hours and two and one-half (2½) hours. I proved that I had picked up these hours and he (Mr. Silas) stated that the committee would contact me by mail since I had been able to clear myself. I then requested the right to clear myself of the additional five (5) hours that would make the thirteen and one-half (13½) hours that I had been accused of dropping the previous night. Mr. Silas was unable to do this. The additional five hours did not exist.

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I requested the right to appear before the committee again that night. Mr. Silas stated I wouldn't be called until the following Monday.

I received via mail a notice to appear on Monday March 4, 1963 as he had promised. However, when I appeared I was told I was not to be heard, that my case was in the hands of the B Committee along with the other men whose status was doubtful, and that the Investigating Committee was holding no meetings after that night.

On March 8, 1963 I sent Mr. James Kearny a registered letter advising him of this situation and I requested that he as president of Local 10 intervene because I wanted 'The chance to clear

myself and correct the mistake' before the committee that incorrectly put the label of chiseler on my name. I got no answer.

Shortly thereafter it was made clear that the records of the men whose job futures were to be decided by the B Committee were to be checked back to June 1959, but it was stated that 'each men will have his day in court'.

Over two months passed and I sent the following wire to William Chester and John Trupp as co-chairmen of the joint B Labor Relations Committee:

> 'This is to avoid any possibility of a mistake. I have been informed by local union officials that your committee may still have me listed with the same LMO violations that I was charged with last February 26. Subsequent to that date it has admittedly been established that the charge was in error. I know that you cannot again take any precipitous action without checking this error. If there are other charges I request that I immediately be notified, confronted, and tried for them so that there will be no delay in my obtaining union membership and A registration along with the other B registered men who have qualified for same.'

Still I got no answer. This is very harrassing. There are rumors of other charges. Mr. Silas has stated to witnesses, Mr. R. Erkkila and others that the charges against me couldn't stand. The B Committee has held many meetings. The Investigating Committee has held meetings since March 4, 1963. Over 400 men have been passed by the committee.

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I have a family to support and keep secure. One side of that security has already been damaged due to the prolonged uncertainty of my future in the industry. I once again request union membership and A registration along with the other men who have qualified.

Very sincerely,
Stanley L. Weir 80524

CC: Harry Bridges"

The following day, June 11, 1963, I sent the following note to Mr. Paul St. Sure, President of PMA, and enclosed a copy of my letter of June 10, 1963 to Holtgrave and Kearny:

"1720 Buena Avenue
Berkeley 3, California

June 11, 1963

Mr. Paul St. Sure, President
Pacific Maritime Association
16 California Street
San Francisco, California

Dear Sir:

I am sending a copy of this letter to you at the suggestion of Paul Jacobs.

Sincerely,
Stanley L. Weir #80524"

I received neither response nor acknowledgment to any of these communications. What I did receive instead was the following unsigned letter, dated June 17, 1963, from the Longshore Labor Relations Committee of San Francisco:

"Stanley L. Weir, #80524

Dear Sir:

You are hereby notified that on the 17th day of June, 1963, at a meeting of the Joint Labor Relations Committee, you were de-registered for cause as a Class B longshoreman, pursuant to the provisions of #9 of the 'Memorandum of Rules Covering Registration and De-registration of Longshoremen in the Port of San Francisco'. Such de-registration was based upon the determination of the Committee that you have violated the applicable rules.

In the event that the Joint Labor Relations Committee receives within fifteen (15) days after the date of this letter, a detailed written statement signed by you, satisfactorily demonstrating that there is no ground for your de-registration, and requesting a hearing, you will be given a hearing, at which you may show cause, if any you have, why such de-registration should be rescinded.

Pending such a hearing, or in the event no further action is taken by you, you are and have been de-registered as a Class B longshoreman as of the 17th day of June, 1963 and are not and will not further be entitled to the rights and privileges of such Class B registration.

Very truly yours,
Joint Labor Relations Committee"

The de-registration letter of June 17, 1963, which I have just quoted has certain salient features of importance in this litigation. Although reference to those matters may break the continuity of the recital

of events in this affidavit, I believe that they are of such importance as to justify the interruption.

1. The defendants have repeatedly told this Court that I and my fellow plaintiffs were de-registered pursuant to a certain set of standards purportedly enacted by the Joint Labor Relations Committee of San Francisco early in 1963. They have nowhere actually told this Court when such standards were enacted by the Joint Port Labor Relations Committee nor have they actually set forth the purported standards themselves. What the defendants have done is to annex to the affidavit of J. A. Robertson, verified March 15, 1965, a series of exhibits. One of these documents is entitled "Summary of Standards". The standards themselves are, curiously enough, not annexed. More curious still is the fact that in a previous affidavit of J. A. Robertson (verified October 2, 1964), he sets forth in quotation, at pages 8 and 9 of his affidavit, what purports to be the standards themselves. When compared with the purported summary, however, they are identical. This may well be so, i.e., the standards and the summary of the standards are identical, but certainly it opens a veritable Pandora's Box of questions, all of which lead to my second comment.

2. Whether there were such standards, what their genuine contents might actually be and whether they were really ever enacted by the Joint Port Labor Relations Committee is immaterial because the Joint Port Labor Relations Committee made it clear that we (I and my fellow plaintiffs) were being de-regis-

tered pursuant to other standards entirely. The Committee's letter of June 17, 1963, is quite specific. It states:

> "You are hereby notified that on the 17th day of June, 1963, at a meeting of the Joint Labor Relations Committee, you were de-registered for cause as a Class B longshoreman, pursuant to the provisions of #9 of the 'Memorandum of Rules Covering Registration and De-registration of Longshoremen in the Port of San Francisco'. Such de-registration was based upon the determination of the Committee that you have violated the applicable rules."

But Section 9 of the 1958 Memorandum is quite specific. It nowhere lists as grounds for de-registration those alleged standards upon which the Joint Port Labor Relations Committee purported to make its judgments of de-registration. It reads:

> "Section 9. *De-registration of Limited Registration (Class B) Longshoremen.*
>
> (a) A Class B longshoreman may be de-registered in accordance with the provisions of Section 16(f) of the Basic Longshore Agreement and, in addition, he may be de-registered for cause by the Joint Labor Relations Committee (in accordance with such rules or uniform procedures as may be established or followed by such Committee) if the Committee finds:
>
> (i) The (sic) he has made any significant misstatement or misrepresentation in his application or interview.
>
> (ii) That he has failed, without leave of absence or excuse, to register at the Dispatch

Hall for a period of four consecutive weeks, such de-registration to be effective as of the beginning of such four week period.

(iii) That he has obtained and is engaged in other work or employment on a full time basis except with the approval or upon authorized leave of absence of the Joint Labor Relations Committee.

(iv) That over a period of three months or more he has had a poor work record as evidence by frequent failures to sign-in, flops or other facts indicating that he has not made himself available for full time dispatch through the Hall, except where he is on leave of absence for illness, disability or for other reason approved by the Joint Labor Relations Committee.

(v) That he has failed to make himself available for any work or shifts to which he may have been assigned by the Joint Labor Relations Committee.

(vi) That he is physically unable to do the work of a longshoreman, except where his disability has been incurred by industrial injury or disease occurring during the course of his employment as a longshoreman on the limited registration list.

(vii) That he fails to develop in respect to the abilities or knowledge requisite to the performance of longshore work and/or if he fails to participate in the longshore training program jointly established by the parties.

(viii) That he fails to participate where he is involved, in procedures established to provide

contract compliance, or that he has violated any other contract provision for which registered longshoremen may be penalized and fails to submit to discipline or penalty regularly provided in the case of registered longshoremen.

(ix) That he has been working in a manner which endangers the safety of other longshoremen.

(x) That he failed to take a physical examination as required by the Joint Port Labor Relations Committee or failed to submit the full report thereof to the Joint Port Labor Relations Committee.

(xi) Or for any other cause; provided that neither membership or nonmembership in the union nor activity or nonactivity for or against the union, shall be a factor in considering applications for registration or in de-registration.

(b) Either party, if it shall have information indicating that a Class B longshoreman is subject to de-registration for cause, may, at a regular meeting of the Joint Labor Relations Committee propose the de-registration of such Class B longshoreman and submit to the Committee any evidence in support thereof, if after consideration of the evidence submitted, the parties jointly concur in the proposal to de-register such Class B longshoreman, he shall be de-registered as of the last day on which he worked as a longshoreman; however, notice of such action taken shall be given by ordinary mail to the person so de-registered, and upon proper application in writing, having been made to the Joint Labor Relations

Committee by such person within fifteen (15) days after the mailing of such notice, said person so de-registered shall be given a hearing by said Joint Labor Relations Committee at which hearing he may submit evidence as to the facts considered by the Committee and others relevant to de-registration; in the event that the Joint Labor Relations Committee, after such hearing shall be satisfied that the person de-registered has shown that he was de-registered contrary to the rules, because of material mistake of fact or otherwise, and there was no ground for his de-registration, it may by unanimous vote rescind such de-registration; otherwise said de-registration shall be effective as of the date on which such de-registered person last worked as a longshoreman. Such notice of deregistration shall be by letter in substantially the following form:

Dear Sir:

You are hereby notified that on the ..... day of ....., 19....., at a regular meeting of the Joint Labor Relations Committee, by unanimous vote, you were de-registered for cause as a Class B longshoreman, pursuant to the provisions of Section 9 of the 'Memorandum of Rules Governing Registration and De-registration of longshoremen in the Port of San Francisco'. Such de-registration was based upon the determination of the Committee that you have violated the applicable rules, and particularly that you have (here give particulars).

In the event that the Joint Labor Relations Committee receives within fifteen (15) days

after the date of this letter, a detailed written statement signed by you, satisfactorily demonstrating that the foregoing statement of facts is erroneous and that there is no ground for your de-registration, and requesting a hearing, you will be given a hearing, at which you may show cause, if any you have, why such de-registration should be rescinded.

Pending such a hearing or in the event no further action is taken by you, you are and have been de-registered as a Class B longshoreman as of the ..... day of ....., 19..... and are not and will not further be entitled to the rights and privileges of such Class B registration.

Very truly yours,
Joint Labor Relations Committee

By .....

By .....

(c) Limited registration (Class B) longshoremen may be de-registered if the Joint Labor Relations Committee determines the list is too long for the amount of work available. De-registration shall be from the bottom of the list after all men who have given cause for de-registration are dropped.

Joint Port Labor Relations Committee"

3. Moreover, there is still another aspect to all of this and an extremely important one at that. Section 9 sets forth the type of model letter which the Joint Port Labor Relations Committee was required to send to any Class "B" longshoreman whom it had

decided to de-register. The last sentence of that model letter requires that it include: "Such de-registration was based upon the determination of the Committee that you have violated the applicable rules, and particularly that you have (here give particulars) ."

The letter I received (as did all the other plaintiffs) is absolutely silent as to the particulars of the charges involved. That this represents a very grave violation of the duty of the defendants is, I submit, obvious. That omission when taken together with the matters I have already related in this affidavit and the further facts I shall hereinafter relate give a completely Kafkaesque quality to the entire proceedings and also give to the asserted protestations of the defendants of high-minded regularity and fairness, a very questionable character if not an absolutely incredible one.

I return to my recitation of events.

On June 21, 1963, after receiving the de-registration letter of June 17, 1963, I wrote the following letter which is self-explanatory:

"1720 Buena Avenue
Berkeley 3, California
June 21, 1963

San Francisco Joint Port Labor Relations Committee
Mr. R. R. Holtgrave, Secretary
c/o Pacific Maritime Association
16 California Street
San Francisco, California
and
Mr. James Kearny, Chairman
San Francisco, JPLRC
c/o ILWU Local 10
40 North Point Street
San Francisco, California

Dear Sirs:

I received your letter in which you de-registered me as of June 17, 1963. It does not inform me of any offense I may allegedly have committed.

Under provisions pursuant to #9 of the Memorandum of Rules covering Registration and De-registration I have had but one questioning of my record for which I was tried during my four years on the waterfront and I was cleared.

I request a hearing.

I request a written, detailed list of any charges you may have against me so that I can prepare for the hearing. I request that I immediately have my right to work restored so that I can support my family during this period.

Very sincerely yours,
Stanley L. Weir #80524

Copies to: Bridges, Bodine, and Thomas."

This letter finally elicited a response. It took the form of a letter dated July 5, 1963, from the Longshore Labor Relations Committee of San Francisco and reads as follows:

> "Your request for a hearing on your de-registration as A Class "B" longshoreman has been granted. This hearing will be held before a special meeting of the Joint Longshore Labor Relations Committee on JUL 11, 1963 at 2 P.M., upstairs at Pier 24, San Francisco. Any medical evidence or other documents to support your case should be submitted to the Committee at this time.
>
> Failure to appear at the time and place indicated will disqualify you from further consideration."

On July 7, 1963, after receiving this letter, I immediately sent a telegram to Mr. R. R. Holtgrave, the Secretary of the Joint Port Labor Relations Committee of San Francisco, reading as follows:

> "DEAR SIR. RECEIVED YOUR LETTER NOTIFYING ME I AM TO HAVE HEARING JULY 11TH I WILL BE PRESENT, BUT YOU HAVE NOT YET TOLD ME THE CHARGE YOU INTEND TO TRY ME FOR I AGAIN REQUEST YOU SO INFORM ME, AND NOT FORCE ME TO APPEAR WITHOUT PREPARATION SINCERELY"

Mr. Holtgrave's reply, likewise by telegram, requires no comment. It reads:

> "YOUR UNION IS YOUR EXCLUSIVE BARGAINING REPRESENTATIVE ON YOUR GRIEVANCE UNLESS YOU INTEND TO PROCEED INDEPENDENTLY WITH THE EMPLOYERS UNDER SECTION 9 OF THE NATIONAL LABOR RELATIONS ACT YOU SHOULD CONSULT WITH YOUR UNION REGARDING THE HEARING"

I immediately did as instructed. On July 9, 1963, I sent the following telegram to Mr. Kearny, President of Local No. 10 and Chairman of the Joint Port Labor Relations Committee of San Francisco:

> "R R HOLTGRAVE SECRETARY YOUR COMMITTEE NOTIFIED ME MY HEARING JULY 11. I WIRED HIM REQUESTING CHARGES. HE RETURNED WIRE THAT UNLESS I WANT TO DEAL WITH HIM UNDER SECTION 9 NATIONAL LABOR RELATIONS ACT THAT MY UNION IS MY REPRESENTATIVE AND I SHOULD CONSULT MY UNION ON THE CHARGE. I REQUEST YOU WIRE ME THE SPECIFIC CHARGES SO I CAN PREPARE DEFENSE."

By this time I was not astonished that I never received either acknowledgment or response.

On July 11, 1963, I appeared as directed before the Joint Port Labor Relations Committee. The session opened with my being told, (a) that I would not be permitted to have counsel, (b) that I would not be permitted to produce witnesses on my behalf, (c) that I would not be told the exact nature of the charges against me but only the general nature of the accusation, (d) that if I wanted to ascertain the precise nature of the charges which were *now* being leveled at me, it would be necessary for me to appear *entirely unaccompanied* (and this was stressed) at the Records' Office of the Committee within one week.

At the "hearing" itself, the union representatives made no offer to represent me, they did not even ask that the Committee be specific in its charges and absolutely gave me no assistance whatsoever. The union representatives were part of the prosecution.

At the "hearing" after being told the things that I set forth above, I was invited to make any statement I wanted. I spoke from written notes and said substantially the following: That I was glad I had the opportunity to speak to the Committee, that I was aware that more detailed attention had been directed toward me than toward any other Class "B" applicant for Class "A" registration because I had been unswerving in my defense of the rights and interests of the "B" men, because they had elected me their leader and spokesman, because I had been the representative elected by the "B" men to represent them before the Executive Committee of Local No. 10, and because, I had been outspoken in opposing the collective agreement as being unfair and completely unjust to the "B" men and, in the long run, towards the entire longshore working force, both "A" and "B", as well, and that I had, in consequence, earned the enmity of the officials of both the union and PMA; that this was not the first unfounded attempt to de-register me; that in April of 1963 the Committee had sent a de-registration letter to me ostensibly on the ground of a violation of the availability rule, but they had to back down and cancel the de-registration when I fought back and established conclusively that the charge was groundless; that this was another attempt to de-register me on groundless charges, just as it was an attempt to de-register other "B" men (the other plaintiffs in this action) on groundless charges, because we had earned the enmity of the leadership of the union and the employers for opposing the short-

sighted and ultimately self-defeating collective agreement; that I had also gained the hostility of the leadership of the union and the employers by protesting the 1960 freeze of promotions of "B" men to Class "A"; that other standards were being applied to me than to other applicants for promotion to "A" status; that those of the "B" men (even those who opposed the collective agreement and the freeze as unfair but were not outspoken about their objections) were checked for a base four-week period, but that those like myself who gave repeated voice to our objections were being investigated with a fine tooth comb for every day of our four years as longshoremen; that the maximum charges against me at one time was four hours, at another it was thirteen-and-one-half hours and still again at another eight-and-one-half hours, and in each instance I had shown them to be baseless charges; that having done so, having demonstrated the charges to be groundless, I was cited again to appear before the Investigating Committee but refused a hearing when I appeared; that I made repeated requests to be heard; that I was aware that the union had hired Asher Harer, the most experienced record checker available to them, to go over my records with a fine tooth comb (as well as the records of some thirty other Class "B" men) and that he had given me a clean bill of health, so to speak; that I was aware that a copy of Mr. Harer's report was in the possession of Mr. Kearny and that it showed that there was but one possible technical violation of this low-man-out rules against me in the entire four-year

period of any "B" registration and that was but for two-and-one-half hours; that I denied that even that two-and-one-half hours was correct and chargeable against me; that I was aware of the low-man-out rules since I was the "B" men's representative; that I was utterly opposed to chiseling of any sort and it was for that reason the "B" men elected me as their representative; that anyone who said I chiseled was a liar; and that I deserved my promotion but that if I did not get it I did not intend to quit and would fight the unjust decision to the bitter end.

During the course of my long statement to the Committee, I made reference to the report of Asher Harer, which I said was in Mr. Kearny's possession. Mr. Kearny interrupted to take out the report and read it to the Committee at that point and, indeed, it stated what I had claimed was in it. I then continued with my statement. When I finished my statement, there was a long silence. Finally, Mr. Holtgrave said, "Are you claiming discrimination by this Committee? Because if you are, the rules say that you can take an appeal within 10 days from today. Do you want to do that?" I told him that I was a bit amazed by his remark since I did not know what their decision would be and in the very beginning they had informed me that their decision would not come down for about two weeks. I concluded by saying specifically that I found their procedure baffling. I said, "How can I appeal within ten days from today from a decision which you tell me you will not reach for another two weeks?" Mr. Holtgrave did not reply but instead said

that if I wanted to I could go to the records checker's office on July 17, 1963, to learn the specific details of what the charges were against me. I said to Mr. Holtgrave, "My experience is very bad with that sort of thing because the last time I went to the records checker's office I never got back to the Committee. How, if I clear myself on the 17th, will I get back here?" Mr. Holtgrave said, "The chances are that you will not, but there will be a PMA man there on the 17th and you may go there if you like." With that remark, I was told the hearing was at an end and I should leave.

I appeared at the records checker's office on July 17, 1963, and this time I was accused of 22½ hours of low-man-out violations on specific dates. I got out my own records which I had with me and tried to show them that each of the alleged violations were groundless. They refused to look at my records. I asked them to produce the sign-in sheets so that I could substantiate my statement that I was not guilty of any of the violations of which I was being accused. This, too, they refused to do. Mr. Edwards of PMA in effect said to me that they were standing on their accusations and that that was the end of the matter. The next day I wrote the following letter which is self-explanatory:

"1720 Buena Avenue
Berkeley 3, California
July 18, 1963

Mr. R. R. Holtgrave, Secretary
Joint Labor Relations Committee
c/o Pacific Maritime Association
16 California Street
San Francisco, California
and
Mr. James Kearny, Chairman
Joint Labor Relations Committee
c/o ILWU
400 North Point Street
San Francisco, California

Dear Sirs:

Your committee de-registered me as a class B longshoreman on June 17, 1963 thus discharging me from my job. At that time you did not supply me with the reasons for your action.

Because I appealed, you sent me a letter dated July 5, 1963 telling me I had been granted a "hearing" on July 11, 1963. Prior to the latter date I telegrammed both of you requesting the charges I was to be tried for. I did not receive the answer I requested.

At the July 11 "hearing" I was not supplied with the specific nature of the charges. I was simply told that I had violated the LMO rules by dropping 23½ hours. Neither of the two lawyers present for the PMA nor the union's four man B committee that had accused me supplied the specifics of the charges. No master sheets, sign in sheets, or (with one exception), dispatch sheets were produced to substantiate the charges.

When I objected I was informed by your secretary that I could learn the exact nature of the charges that I was being tried for on that day (July 11, 1963) on July 17, 1963 at the Records Office.

When I arrived at this 'closed door' confrontation at the Records Office to learn of and discuss these charges there was present Mr. Edwards of the PMA, Mr. Rizer, the records checker, Mr. Hoffman of the B committee Mr. Hunter, the sargent at arms and for part of the time looking on was Mr. Silas. I was presented with charges that now totaled 22½ hours.

Was I being tried by these men instead of your committee of authority? Did they have the power to clear me or find me innocent? I was not told that my hearing was to be continued at the records office or that any but your committee had jurisdiction.

In view of the above I request a real hearing in front of your committee.

(Again I point out that I should not be tried for more than the hours I allegedly dropped on the basis of the first four week check. The amount was less than 10 hours. The men who were given A registration and not de-registered were not checked for more than four weeks if the amount was less than 10 hours. I was checked for at least sixteen (16) weeks. I met the standards by which over four hundred men were promoted to union membership and given A status. Among those correctly promoted were men found guilty of LMO violations. Their sentence was 30 days off as the contract stipulates. I, who have never been tried, have already had over 30 days off.)

I request that all the charges be backed by all the relative documents from the records office needed to substantiate them.

Only in such a hearing can I for the first time have the opportunity to make my defense. In addition to simple adherence to democratic procedure I add that the extreme complexity of the LMO system makes this doubly true. I seem to recall that at the July 11 'hearing' I was told I would not be allowed to produce witnesses. In the light of the fact that my four prosecutors of the union's B committee were present as were two PMA lawyers from PMA who participated and from whom your secretary received counsel in the 'hearing', am I to be denied witnesses and counsel in my behalf?

Sincerely,
Stanley L. Weir #80524"

Parenthetically, just in the event I have not yet made it clear, I hereby deny that I was guilty of any of the violations which were specifically charged against me at the records office on July 17, 1963.

The next event which occurred was that I received a letter on the stationery of the Longshore Labor Relations Committee of San Francisco, which reads as follows:

"July 23, 1963

Stanley L. Weir

Dear Sir:

This letter will advise you that the Longshore Labor Relations Committee has considered your appeal on de-registration which was heard at the meeting of July 11, 1963.

After a thorough investigation and review of the facts in your case, the Committee has decided that these facts are such that the application of the rules agreed to between the parties to these facts requires your deregistration. Accordingly, its decision is to reaffirm the determination made on June 17, 1963 that you are deregistered.

Very truly yours,
R. R. Holtgrave
Secretary"

On July 27, 1963, I took an appeal and in doing so wrote a letter which reads as follows:

"July 27, 1965

R. R. Holtgrave, Secretary
James Kearny, Chairman
JLRC (PMA-ILWU)
16 California Street
San Francisco, California

Dear Sirs:

Your committee de-registered me on June 17. On July 24, I received your letter denying my hearing appeal. In so doing you consummated an action that is discriminatory. You have not judged all the men involved by the same standards.

I appeal your decision and request another hearing as stipulated, where I will prove and document this discrimination.

I have never been able to get from you an official statement specifying the alleged charges against me, nor did your committee produce documents to substantiate the charges.

Would you please correct this situation for the next hearing."

Substantially, all of the other plaintiffs wrote identical letters of appeal on that date. All of the plaintiffs, including myself, waited patiently hoping that our appeals would be called for a hearing. After waiting eight-and-three-quarter months without acknowledgment or response or any other action whatsoever by the defendants, the other plaintiffs and I commenced this action. Before this action was commenced, however, I tried to find out if the Committee and the defendants intended to act on the appeals and when that would be. I telephoned for information and was informed that the matter was closed. The decision of July 23, 1963, I was informed, was final. It was then that this action was actually commenced.

Before going on to discuss the evidence upon which I ask this Court to conclude that the defendants acted against me (and the other plaintiffs) with hostility, in bad faith and with open malice, I believe it apposite to bring to the attention of this Court the fact that there have been at least three separate, protracted, plenary hearings in collateral proceedings dealing with the underlying events and that *in each of those hearings the factual conclusions arrived at independently by the respective impartial hearing officers either have been sharply at variance with or totally contradictory of the arguments, assertions, conclusions and contentions of the defendants as they have been presented to this Court in this litigation.* This has been true, first, in the hearings before the California Unemployment Insurance Appeals Board where nearly 1,700 pages of testimony were elicited and

scores of exhibits scrutinized in a bitterly contested proceeding and, secondly, in the protracted hearings before a Trial Examiner of the National Labor Relations Board, in a relevant allied proceeding, where again extensive testimony was heard and large numbers of documentary exhibits were considered. For the information of this Court, I hereby annex hereto, make part hereof and mark as Exhibits, photostatic copies of the following:

Exhibit "C"—Decision of Donald Gilson, as Referee, dated May 14, 1964, for the California Unemployment Insurance Appeals Board in proceedings entitled, "In the Matter of James V. Carter, et al.", Case No. SF-3033. I am one of the claimants in these proceedings.

Exhibit "D"—Decision of Albert E. Gatley, as Referee, dated August 16, 1963, for the California Unemployment Insurance Appeals Board in proceedings entitled, "In the Matter of Roger W. Fleeton," Case No. OAK-4519.

Exhibit "E"—Decision of the California Unemployment Insurance Appeals Board, dated February 14, 1964, in an appellate decision entitled, "Roger W. Fleeton, Claimant-Respondent, vs. Pacific Maritime Association, Employer-Appellant", Benefit Decision No. 63-3167.

Exhibit "F"—Decision of Herman Marx, as Trial Examiner, for National Labor Relations Board, dated May 4, 1965, in consolidated proceedings entitled, "Pacific Maritime Association and Johnson Lee, et

al." (Case Nos. 20-CA-2787 etc.) and "International Longshoremen's and Warehousemen's Union, Local No. 10 and Johnson Lee, et al." (Case Nos. 20-CB-1121 etc.).

It would serve no useful purpose to summarize the foregoing exhibits in detail in this affidavit, but it is important, however, to point to certain salient aspects of those decisions.

First: In the proceedings before the California Unemployment Insurance Appeals Board involving as claimants many, if not most, of the plaintiffs in this action (among whom I am one) (*In the Matter of James V. Carter, et al.,* Case No. SF-3033) the decision of the Referee (Donald Gilson), dated May 14, 1964, (Exhibit "C") which was reached, as I have already observed, after considering testimony covering nearly 1,700 pages of transcript, including several hundred pages of testimony by representatives of the defendants, stated:

> "The questions presented are two in number and are mutually exclusive. First, if the claimants herein voluntarily left their work, did they do so without good cause? Secondly, if the within claimants were discharged by their employer, was such discharge for misconduct?" (p. 10)

It is important to observe the conclusions arrived at by the Referee with respect to these two questions. In dealing with the first he concluded:

> "In order to evaluate the circumstances in the instant cases with the cited cases, it is necessary to review briefly the circumstances in which the

claimants are found. They had worked since 1959 as longshoremen and, as such, were subject to the rules and regulations that have been hereinabove set forth. In this capacity they were obliged to pay a *pro rata* cost of the hiring hall, which they all did, even though at times they were late with such payments. It is worthy of comment, however, that as of the date that consideration was given to them for reclassification as Class A longshoremen, they were all in a current condition in respect to their *pro rata* payments. In each such instance the individuals had paid the $1 per day fine,* which was established for tardy payments and in each such instance, the man continued fully eligible to be dispatched to work as a Class B longshoreman and was in fact dispatched as such over the years involved.

"Similarly, some of the claimants herein had been subjected to penalties in connection with violations of the 'low-man-out' rule. It is true that errors had occurred in respect to the hours used by some of the claimants herein. Such errors had occurred in some cases *because of a rule adopted by the dispatcher* in connection with Sundays and, in other cases, it was *because lack of*

*The $1.00 per day fine imposed for late payment of *pro rata* was an exaction imposed unilaterally by the union. It seems not to have been imposed pursuant to any provision of the collective bargaining agreement. It together with the *pro rata* was paid into the union treasury from which undisclosed sums were used to defray the union's portion of the cost of maintaining the hiring hall. In the decision of the Trial Examiner for the NLRB, referred to above, he found: "The San Francisco Port Committee fixed the 'pro rata share' payable by Class B Registrants, charging $8 per month since some point in March 1963, and $6 per month prior thereto. These payments are made by the registrants directly to Local 10, which levies and collects a fine of $1 for each day a B registrant is in arrears." (Decision, p. 5:1-6)

knowledge and understanding of the rules and confusion in the minds of the claimants as to the proper hours to be used. In each such instance the claimants had been continued in employment until the decisive action of the Joint Port Labor Relations Committee which is the subject matter of the instant case.

* * * * * * *

"After analyzing all the facts, *it is inherently impossible to believe that the claimants herein could logically have been expected to anticipate that their acts would result in the loss of their employment. In brief, the claimants did not embark on a course of action which they knew or should have known would result in the loss of their employment. As a matter of fact, over the years a pattern of behavior was established which was condoned and allowed by the employer, the union and the Joint Port Labor Relations Committee."* (pages 12-13)—(Italics added.)

Even more pertinent are the conclusions of the Referee with respect to the second issue, namely, "whether or not such discharge was for misconduct." In reaching his conclusions on this issue the Referee stated that the standard which he employed in determining the issue was whether the claimants had been discharged "because of a material breach of duty owed the employer under the contract of employment which breach tends to injure substantially the employer's interest." His conclusions read in part:

"A careful analysis of the facts shows that during the period of the claimants' employment from 1959 to June 17, 1963, they were retained as

registered Class B longshoremen and as such were dispatched to such employment as became available through the hiring facilities of the jointly operated hiring hall. During this period of employment, as has been indicated hereinabove, all the claimants became involved to a more or less extent with one or more of the stated violations of the rules adopted for their conduct. Again, emphasis must be placed upon the fact that violations in respect to the working rules or in respect to availability were considered at the time of occurrence and penalties were assessed. Those penalties being satisfied, the individuals were continued as Class B longshoremen and were dispatched to employment as it arose. *If* the Joint Port Labor Relations Committee was harmed in any way or *if* the companies for whom the services were performed through the facilities of the Joint Port Labor Relations Committee were jeopardized, *such acts against the employer's interest were condoned and abrogated* by the imposition of the penalty and the satisfaction thereof.

"In connection with the violations of the *pro rata* payment and the 'low-man-out' rule, it is especially noteworthy that the principal party to be aggrieved by such violations was the International Longshore and Warehousemen's Union, inasmuch as such violations affected the financial operation of the hiring hall and also was of a nature whereby the so-called 'chiseling' of the claimants was to the detriment of the members of the union. Yet, despite these acts which would jeopardize the union organization rather than the employer organization or the Joint Port Labor Relations Committee, the ILWU at the meeting

of the Joint Port Labor Relations Committee, on July 16, 1963, moved that individuals involved in the LMO violations and *pro rata* payment violations be *re*registered and moved to Class A registration. *This would indicate that the principal party which would be aggrieved by the acts of the claimants was not in fact aggrieved* and that the grievance was not of a nature which would preclude the union desiring such individuals to be promoted to the higher classification and accepted into membership.*

"When these circumstances are considered along with the fact that violations of the LMO program *would* in no way jeopardize the functions of the Joint Port Labor Relations Committee and that said Joint Port Labor Relations Committee had previously *condoned* the other violations that are involved herein, it is concluded that there is serious doubt that the acts of the claimants constitute misconduct. . . .

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*It may well be noted that the motion referred to was made in response to two motions which were "overwhelmingly adopted" at a membership meeting of Local 10 on July 11, 1963, which read as follows:

"M/S/C THAT ALL 'B' MEN WHO ARE ON APPEAL AND WHO HAVE NOT BEEN PROMOTED SOLELY BECAUSE OF LOW-MAN-OUT VIOLATIONS SHALL BE GIVEN 30 DAYS OFF AS PER CONTRACT AND PROMOTED TO 'A' REGISTRATION.

"M/S/C THAT THE LABOR RELATIONS COMMITTEE BE INSTRUCTED THAT ALL 'B' MEN WHO ARE ON APPEAL AND HAVE NOT BEEN PROMOTED SOLELY BECAUSE OF PRO-RATA VIOLATIONS SHALL BE RE-REGISTERED AND MOVED TO 'A' REGISTRATION." (Local 10 Longshore Bulletin, July 19, 1963.)

Two things are most significant here: the membership, who in the ultimate analysis, constitute the "aggrieved" party did not consider themselves so and, moreover, they "overwhelmingly" recognized the deregistrations of the B men to be contrary to the contract.

". . . . The circumstances herein are such, and the evidence serves to establish, that the claimants desired to continue working and that they had no reason to believe that violations occurring over a period of three or four years, for which proper penalty had in each instance been made, would result in the loss of their employment. *Their acts were not of a nature to be wilful or indicative of intentional disregard of the interests of the Joint Port Labor Relations Committee. . . . A discharge under such circumstances is not for misconduct. . . .*" (Pages 13-14; italics added.)

Secondly, in the separate proceedings before the California Unemployment Insurance Appeals Board involving Roger W. Fleeton (Case No. OAK-4519), (Exhibit "D") one of the plaintiffs in this action, the Referee (Albert E. Gatley) concluded:

"The claimant herein was terminated from his employment by the action of a joint labor relations committee made up of members of his unions* and employers. He has testified under oath he was advised by the union dispatcher that he was not required to be available for dispatch on Sunday and that it was customary of longshoremen in his category not to be available on Sundays. It was further the custom of individuals in this category not to report penalty hours in the event that they missed employment opportunities on Sundays. *The employer was unable to present any evidence that would contradict this testimony.* The claimant's alleged violations of the registra-

*This is an error. The claimant was not a member of the union. The Committee was made up of representatives of PMA and Local 10.

tion rules were committed months in advance of any action taken by his union or the Joint Relations Labor Board. Although the employer is a party to the agreement which established the dispatch rules, the claimant's discharge was instigated by the union and the distribution of work program was for the benefit of the union members. In the opinion of the referee *the evidence does not substantiate a finding that the claimant violated an obligation owed to the employer and further, it could not be said that the claimant's actions were wilful so as to constitute misconduct. . . .*" (Page 3; italics added.)

PMA appealed this decision to the Board. On February 14, 1964, the Board affirmed the Referee's decision and in doing so wrote:

"The claimant testified that he and others of the group of Class B longshoremen had been informed by a union official that it was not necessary that they register or be available for work on Sundays because of the slight chance that Class B men would obtain Sunday employment, and that the matter would be taken up with the Pacific Maritime Association to confirm the action. The dispatchers were not charging Class B men with hours of work on Sunday but were leaving the registration sheet blank. The violation of which the claimant was accused was that he had work opportunities in April and in August 1962, on Sundays, and did not report the 'flops' or reregister the following Monday, as is required by the rules. The claimant further testified that such procedure was common practice among all of the Class B longshoremen. . . .

> *"The witness for the employer was unable to state whether this practice was a standard practice. . . ."* (Page 8; italics added.)

The Board, in unanimously affirming the Referee's decision, concluded:

> ". . . the express intention of violating the rules . . . is absent in the matter presently before us. In the present case the claimant had been informed by the dispatcher, a union member, that it was unnecessary for Class B members to register and hold themselves available for work on Sundays because of the slight chance that they would be called. It appears as if it was standard practice for Class B members to absent themselves on Sundays without incurring a penalty. While the published rules are specific about the necessity of observing the rules strictly, it is our opinion that the claimant was entitled to rely on information given to him and to others in his situation, from one in authority. We hold, therefore, that the claimant did not intentionally violate the rules of the Joint Labor Relations Committee. . . ." (Page 10.)

Thirdly, there were extensive hearings before a Trial Examiner of the National Labor Relations Board (Exhibit "F") involving five Class B longshoremen who were deregistered together with these plaintiffs on June 17, 1963, and upon allegedly substantially identical grounds (Case Nos. 20-CA-2787; 20-CA-2788; 20-CA-2796; 20-CA-2796-2; 20-CA-2796-3; 20-CB-1121; 20-CB-1122; 20-CB-1124; 20-CB-1124-2;

20-CB-1124-3). In effect the Trial Examiner found that the alleged grounds upon which the defendants ostensibly predicated deregistration of the Class B longshoremen there involved were without substance and recommended, among other things, their reinstatement with back pay and interest. In its salient aspects that decision is extremely pertinent here. A copy of the decision is before this Court as an exhibit. Its length precludes summarization. However, I stress its importance on this motion because of its detailed recital of the underlying facts involved, its careful analysis and evaluation as to the weight, credibility and implications of the testimony adduced and its overall conclusions. I venture the opinion that if this decision, together with the decisions rendered after the unemployment insurance compensation hearings, are placed on one side and the factual allegations of the defendants in this litigation are placed on the other, the conclusion will be inescapable that there is something less than good faith in the self-righteous presentations and protestations of the defendants in this litigation.

I have charged that the defendants discriminated against me from motives which were malicious; that they did so with overt hostility; and that the defendant unions, with the aid and assistance of PMA denied me entirely fair representation.

These statements are, of course, in part, conclusions. To a certain extent I have already set forth the factual basis upon which these conclusions rest. I now propose to deal with certain of the facts which will

"round out the picture," so to speak, and demonstrate fully the motivations involved.

I was, as those already pointed out, registered as a Class "B" longshoreman on June 1, 1959. This date is important because it comes during a period which marks the end of certain tentative negotiations which were being conducted between PMA and ILWU—negotiations which had been under way for several years and which were soon to conclude in an intermediate stage: the execution on August 30, 1959, of a certain collective agreement effective for a three (3) year period commencing retroactively on June 15, 1959, and ending on June 15, 1962, with provisions for certain further negotiations annually during the three year term. Because of the importance of this agreement to the remarks which I shall hereinafter make, I annex a copy thereof as Exhibit "G". I shall discuss it more fully hereinafter, suffice it now to note that I was outspoken in my opposition to this agreement because of its immediately injurious effects on the working conditions of the Class "B" men and, over the long run, to the detriment of the Class "A" men as well. I shall return to this subject hereinafter.

The original category of registered longshoremen came into existence as a consequence of the bitter waterfront strike of 1934 on the Pacific Coast. It was terminated with a collective agreement but only after it riveted the attention of the entire nation upon it and, likewise, only after it invoked Presidential intervention. It represented one of the high points of labor militancy in this country. The settlement which came

out of it provided, among other things, for the registration of the permanent longshore work force. Registration had a twofold aim: it sought to satisfy the needs of the employers by making available a stabilized labor force while simultaneously affording longshoremen regularity and continuity of employment.

During the next dozen years or so the waterfront on the Pacific Coast remained a place of troubled peace. The period was marked by a host of major strikes of almost equal bitterness and by an almost countless number of sporadic and local strikes.

The last of the major disruptive strikes occurred in 1948 and lasted for 95 days. It was following the settlement of that strike that a new spirit of accommodation gradually was achieved. Several factors combined to make that result possible. First, there was a change in the leadership of the employer group. This was a necessary condition for the purpose of better accommodation, but not a fully sufficient one. Two other conditions were far more significant: (1) There were the beginnings of mechanization applied to the loading and unloading of cargo and the recognition that the trend toward the use of labor saving devices was not a trend capable of being stopped in its tracks. Longshore union militancy could disrupt and obstruct but it could not permanently halt the trend. The trend proved the threat of a future decreasing need of as large a longshore working force as had prevailed in the past. ILWU and the registered longshoremen were extremely cognizant of this factor and seemingly tempered their activities accordingly.

(2) From the point of view not only of ILWU and the registered longshoremen, but also from the standpoint of PMA, there was beginning to be a very discernible drop in the number of registered longshoremen, a drop in the availability in the experienced longshore labor force, which was the consequence of normal attrition in any closed category: their deaths, there were injuries and retirements, there were transfers to other occupational pursuits and other related factors at work all of which served to decrease the number of registered longshoremen regularly available.

There was yet another factor involved which was even more crucial than all of the foregoing: the average age of the registered longshoremen had and was continuing to increase. This left them less and less able to do the arduous work which—in spite of all the mechanization conceivable—still remained an absolute necessity in very large areas of longshoring.

By the mid-1950's, these factors were, not only recognized but openly discussed by all interested parties. Toward the end of 1957, conversations of an exploratory nature had begun between PMA and ILWU looking toward possible solutions for the problems these factors posed. For PMA the great aim, of course, was the elimination of all, or substantially all, of the restrictive practices which were embodied in the then existing collective agreement and which had been attained by ILWU over the years from 1934 on. To a certain extent those restrictive practices involved what Harry Bridges termed the forced

use of "witnesses:" longshoremen who were totally unnecessary for the accomplishment of the tasks involved. But, this was but a part, and perhaps not the chief part, of the restrictive practices which PMA sought to end. It sought a free hand in its operations: it wanted to be the sole judge of what was proper in its utilization of its labor force. PMA members did not as a consequence of the collective agreement which was subsequently entered in for the first time begin to mechanize. It had been doing it right along. What it wanted was to be able to determine for itself what the minimum labor it required to man its equipment and not the optimum number or the number the unions had attained as the minimum in prior collective agreements.

ILWU, for its part, faced the problem of how eventually to protect the Class "A" longshoremen who were more and more coming to an age at which they were necessarily required to retire or physically incapable of doing demanding tasks. There was recognition, too, that inevitably the restrictive work practice rules would to some extent have to be given up. For both PMA and ILWU, there was additionally the necessity of having a replacement body of longshoremen who would be available to do the more arduous work which still remained, which continues to remain in abundance and with respect to which mechanical devices are either no substitute or even useful adjunct. Such supplementary body of longshoremen were, of course, also necessary as replacements for the natural losses incurred in the closed

category of registered longshoremen. Tentative feelers between the parties in the mid-1950's indicated a desire on both sides to compromise the differences between them. Certain exploratory approaches were therefore made. In 1957, the parties opened practically the entire field of longshore protective provisions for negotiation. This was done following a union caucus consisting of delegates elected by locals to determine policy, which met in October of that year.

Subsequent to that union caucus, ILWU submitted a memorandum to PMA on November 19, 1957 in which ILWU proposed more formal negotiations and listed the following as mutual objectives to be explored:

> "1. To extend and broaden the scope of cargo traffic moving through West Coast ports and to revitalize the lagging volume of existing types of cargo by:
>
> (a) encouraging employers to develop new methods of operation; (b) accelerating existing processes of cargo handling; and (c) reducing cargo-handling costs in water transportation, including faster ship turn-around.
>
> "2. To preserve the presently registered force of longshoremen as the basic force of the industry and to share with that force a portion of the net labor cost saving to be effected by the introduction of mechanical innovations, removal of contractual restrictions, or any other means."

In other words, to explore the possibility of giving to members of PMA as complete freedom for the

manner, mode and nature of their operations as they had practically enjoyed prior to 1934 at the expense of longshoremen not of the Class "A" category.

These negotiations had certain concrete results. One of the first and, of course, one of the most important of them so far as this litigation is concerned is the fact that on March 18, 1958, the Joint Port Labor Relations Committee in the Port of San Francisco adopted the 1958 Memorandum whose purpose, among others, was to set the machinery going for registration soon thereafter of a large group of Class "B" longshoremen. The plaintiffs were that group of Class "B" longshoremen.

The second result was involved with our induction as Class "B" longshoremen in the middle of 1959. With our induction the groundwork was laid (a) for relieving the Class "A" men of the duty of doing taxing, difficult and back breaking work—that work was now, in practice, exclusively for the Class "B" men, who under the rules could not refuse to take such assignment—and (b) for eliminating, in practice, substantially all of the protective rules embodied in previous collective bargaining agreements because practically speaking, now the only ones injured by the elimination of such protective work rules were the "B" men with whose protests neither the leadership of the union nor the employers were concerned. The collective agreement of August 10, 1959 (Exhibit "G") followed soon thereafter.

It is of interest in this connection to note that in August of 1959, at or about the time the new agree-

ment was entered into, PMA (with the cooperation of ILWU) hired Max D. Kossoris of the Bureau of Labor Statistics to make various studies for it. Subsequently, in January of 1961, Mr. Kossoris published an article in the Monthly Labor Review entitled "Working Rules in West Coast Longshoring" in which some very pertinent comments were made. He wrote at page 4:

> "To make some progress in the desired direction, the PMA and the ILWU entered into the remarkable agreement of 1959. For a payment of $1½ million, the union agreed to go along with any and all mechanization during the 1959-60 contract year; but all restrictive rules were to remain in full effect. The 1958 fully registered work force was to be maintained, subject only to natural attrition—i.e., deaths, retirements, and dropouts. The employers, in addition to the right to mechanize without fear of reprisal by the union, bought a year's time during which to develop a measurement system accurately determining the man-hours saved.
>
> "This was the initial step. The ultimate objective was stated to be:
>
> "To guarantee the fully registered work force a share in the savings effected by laborsaving machinery, changed methods of operation, or changes in working rules and contract restrictions resulting in reduced manpower or man-hours with the same or greater productivity for an operation.
>
> "This objective went far belond mechanization. It included—on the basis of the cited language—*any* change that resulted in greater productivity,

> regardless of how it was brought about. The union clearly recognized that restrictive working rules were part of that picture. The agreement also was silent on what the union was to get as its share of the savings. This was to be left to later negotiations when the measurements would indicate the size of such savings. Then the parties would know what they were bargaining about."

Mr. Kossoris acknowledged the entirely one sided nature of the 1959 agreement: its purpose was "to guarantee the fully registered work force . . ." but of benefits to the other members of the collective bargaining unit—the Class "B" men—there were none.

Mr. Kossoris tells us certain other revealing information:

> "During the first bargaining session on May 17, 1960, the ILWU's negotiators were surprised to learn that the employers were no longer interested in the sharing of gains. Instead, the employers' position was: How much will it cost us to get rid of the restrictive rules and to get a free hand in the running of our business?"

Mr. Kossoris thereafter tells us:

> "Behind this shift in the employers' position was a significant and interesting change in thinking. During the preceding 2 years, the ' "sharing of gains" ' concept was generally accepted, although with at least one important defection. It seemed a reasonable and equitable way out of the bind of restrictive rules, and it promised far-reaching benefits. But early in 1960, the men

running some of the larger steamship companies reversed their thinking. To permit the union to share in gains was considered an invasion of management's prerogatives and consequently was completely unacceptable. Management decided to '"buy out"' the restrictive practices and labor's opposition to mechanization. The problem was the price.

"The employer and union negotiators proceeded from very different starting points. In exchange for a free hand, management offered a guaranteed wage that would protect the longshoremen against lost work opportunity. To the union, this was completely unacceptable. Conceivably, cargo might increase in volume so that no longshoremen would lose work; and then the union would get nothing for giving up its restrictive rules. The union's position was: We'll give up our rules, for a price; but we set a high value on our rules because we think the companies will gain millions of dollars.

"Subsequent negotiations—which stretched out until the ground rules of the 1960 agreement were settled on October 18, 1960—revolved around the questions of how much and what for."

All of these negotiations culminated in a series of agreements and understandings between PMA and ILWU the net practical effect of which is that for a price of $29,000,000 the employers—PMA—bought all of the protective devices which had been developed over the years since 1934 for the protection of the longshoremen with all of the benefits running to one category of the collective bargaining unit only—the

Class "A" men so registered as of August 10, 1959. All of the detriments were at the cost of the remainder of the members of the collective bargaining unit—the Class "B" men. And even to the extent that some provision remained for the protection of the "B" men in theory it became illusory in practice because the collective agreement provided that a strike in protest against various conditions by the union would serve to reduce the $29,000,000 fund at the rate of $13,650 per day. Since the then registered Class "A" men would be penalized by such action, it took from them and from the leadership of ILWU any incentive to really protect the Class "B" men from whatever conditions the employers now imposed upon them.

The foregoing represents one aspect of the background events upon which, when taken in connection with certain other facts to be set forth hereinafter, I shall ask this Court to conclude that there has been bad faith, malice and hostility toward me by both PMA and ILWU. However, there is another background phase, likewise, necessary for such understanding. I turn to that matter now.

Within a few days after our induction as Class "B" longshoremen a special meeting of all Class "B" men was called. Attendance was compulsory. We were addressed by officers of Local No. 10 who first informed us that we were to be governed by the 1958 Memorandum and the Low-Man-Out Rules and, secondly, they represented to us that within six months to one year all of us would be moved into Class "A" status. Mr. Chester, the International Representative

to Local No. 10, in his address dealing with this subject represented to us that this was a firm understanding and that we could count on it.

At first it seemed that that understanding was to be kept. Early in 1960 some 163 Class "B" men were approved for transfer to Class "A" and we were informed that the resolution pursuant to which this was to be done provided for further transfers at the rate of not less than 15 Class "B" men per month thereafter to make up for the natural attrition in the Class "A" category. Before any transfers were made, however, the 1960 contract negotiations came along and all Class "B" men were frozen, including the 163 Class "B" men who had already been approved.

These two factors: The detrimental effect on the "B" category and the freeze on promotions led to much discontent among the entire "B" group. I was, perhaps, the "B" man most outspoken in my condemnation and disapproval although the feeling was quite general throughout the "B" ranks. The dissent continued to grow. The consequence was that Local No. 10 invited the Class "B" men to elect three of their ranks as representatives to the Local No. 10's Executive Board. They hoped that thereby some of the considerable discontent might be abated. I, being one of the most outspoken of the "B" men, was elected one of the three representatives to the Executive Board.

We actually attended but few sessions of the Executive Board. At the very first session we attended Thomas Silas and Carl Smith moved to exclude us

except for those items on the agenda dealing specifically with "B" men. The next session we were again met with hostility and abuse and again Carl Smith and Thomas Silas attempted to have us excluded. In the third and last session we attended we fared no better. William Chester moved to exclude us and this was done.

During that period it was made clear to us and especially by Thomas Silas that our opposition to the agreement and our opposition to the freeze on the "B" men's status had made of us and our following among the "B" men *persona non grata* to the leadership of the union and to the employers. Silas bluntly told us that we as representatives of the "B" men were being watched continuously and that we would be deregistered at the first opportunity that presented itself. That his threat was well founded was shortly thereafter confirmed when the other two Class "B" representatives were deregistered. I alone survived and at one time I was even told by Albert Bertani, an official of Local No. 10, that, "If they don't get you one way, they will another." I was, in short, a marked man and to a lesser extent were those who supported me most strongly among whom are most of the plaintiffs.

Among other typical incidents I can relate which bear upon my allegation of hostility, malice and bad faith is one which is quite clear. In the autumn of 1961 Harvey Swados published an article in Dissent entitled "The West Coast Waterfront". That article in the main argued the objections I had frequently

maintained in opposition to the contract and the exploitation of the "B" men. I had two copies of the article and from time to time I lent one of them to various longshoremen to read. (For the information of this Court a photostatic copy of that article is hereto annexed, made part hereof and marked Exhibit "H"). Subsequently, in the office of James Kearny and in the presence of Albert Bertani, Pat Tobin, a close friend of Harry Bridges, said to me that I could expect to be a victim sooner or later because I hadn't acted wisely. I said to him, "What have I done to bring on Harry Bridges' wrath?" He told me that I had been observed lending copies of the article to Class "B" men. I said, "Isn't it my right to do that if I please?" He replied, "Yes, but it wasn't smart to do it." Then he repeated, "if you had been smart you certainly wouldn't have done it." Later on in the conversation he also said, in substance, that I had not been wise in being too outspoken in opposition to the contract and implied that I would pay a price for it.

I respectfully submit that I have shown that my charges of bad faith, malice and hostility are predicated upon a sound factual showing. I have demonstrated among other things that my position of leadership and opposition among the "B" men earned me the animosity of both the leadership of the union and PMA because both had equal stakes in the agreement and its discriminating features directed against the "B" men. Most of the plaintiffs were my firm supporters and they too thereby became the victims of hostility, malice and bad faith. All of us have been

victimized because we antagonized the existing bureaucrats of ILWU, Local No. 10 and PMA, although in Local No. 10 there were some officials who were men of integrity and who told me they hated to be part of the frame up against me but that they were powerless to interfere. All of the plaintiffs have just cause for complaint in this litigation.

There is an additional matter that I desire to mention in this affidavit: the hostile discrimination as it manifested itself in disparity of treatment. This took on a variety of forms. Perhaps the most immediately important one is involved with the fact that during the processing of the "B" men for transfer to the "A" status prior to our deregistration on June 17, 1963, we were not judged by equal standards: invidious discrimination was involved. However, the evidence of this is in the possession of the defendants, and although I know the evidence exists, and where it is to be found, I shall not be able to do so until the trial of this action, because its disclosure awaits the employment of discovery, inspection and deposition proceedings.

There are, however, two aspects of disparity of treatment that I can point to immediately.

(1) J. A. Robertson, Secretary of PMA, in his affidavit submitted to this Court, verified October 2, 1964, stated that among the rules adopted was the following:

> "1. Any class 'B' longshoreman found to have 10 or more hours of Low Man Out violations shall

be considered eneligible for advancement to Class 'A' registration,"

and, therefore, was required to be deregistered (p. 8).

I quote the following from the Local No. 10 Longshore Bulletin and I submit that comment is unnecessary:

"LOW-MAN-OUT VIOLATORS (Night Hold)

Name	*Brass*	
John E. Thompson	# 75130	dropped 55½ hours in four (4) weeks Penalty—30 Days Off
Josephus Moore	# 66218	dropped 77½ hours in four (4) weeks Penalty—30 Days Off
Leo Breda	# 77849	dropped 55¾ hours in four (4) weeks—2nd offense Penalty—Six (6) Months Off
Langford Boyd	# 8984	dropped 46 hours in four (4) weeks Penalty—30 Days Off
Charlie W. Phillips,	# 69843	dropped 50 hours in four (4) weeks—2nd offense Penalty—Six (6) Months Off"

Another typical entry from the Local No. 10 Longshore Bulletin:

"LABOR RELATIONS COMMITTEE—At Labor Relations Committee meeting of Tuesday, June 18th, L. Wilderson #6546, day winch, was given 30 days off for low man out violations in the Hiring Hall. He dropped 22½ hours in four weeks.

"At the Labor Relations Committee meeting of Tuesday, June 25, 1963—Curtis Hill #67428, night winch board, was found guilty of dropping 34½ hours in 6 weeks. Second offense and 6 months off."

Mr. Robertson next informed this Court that a second such rule provided that deregistration would necessarily follow for any "B" man who had "been late in the payment of his pro-rata eight or more times." The defendants have not tired of repeating how serious an offense this ostensibly is.

Without further comment, therefore, I annex hereto as exhibits five bulletins published at various times by Local No. 10, (Exhibits "I-1", "I-2", "I-3", "I-4" and "I-5"). I invite this Court's comparison.

Wherefore, I respectfully pray that this Court deny the several motions of the defendants in all respects.

Stanley L. Weir

Subscribed and sworn to before me this 11th day of August, 1965.

(Seal) Grace G. Hackett,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires February 9, 1967.

No. 20,719

United States Court of Appeals

For the Ninth Circuit

GEORGE R. WILLIAMS, et al.,
Appellants,

vs.

PACIFIC MARITIME ASSOCIATION,
a non-profit corporation,
et al.,
Appellees.

BRIEF FOR APPELLEES,

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, a voluntary unincorporated association, LOCAL 10 OF INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, a voluntary unincorporated association, HARRY BRIDGES, HOWARD BODINE, L. B. THOMAS, WILLIAM CHESTER, ROBERT ROHATCH, THOMAS SILAS, CHARLES HOFFMAN, JOSEPH PEREZ, ALBERT JAMES, RICHARD HARP and JAMES KEARNEY

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No. 20,719

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This brief is filed on behalf of the above-named unions and individuals and will deal with questions of jurisdiction, with questions relating to the exhaustion of contract grievance procedures, and with questions relating to the personal liability of individual union officers for damages.

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[1]Mr. Bodine died in April of 1966; Mr. Thomas in January of 1967.

I.

STATEMENT OF JURISDICTION

Appellants have alleged that the district court's jurisdiction of this action rests on section 301(a) of the Labor Management Relations Act of 1947 (29 USCA 185[a]) which reads, in pertinent part, as follows:

> "Suits for violations of contracts between an employer and a labor organization . . . may be brought in any district court of the United States . . ."[2]

Because the district court concluded that the gravamen of appellants' case, as stated not only in their fourth amended complaint but also in the preceding four pleadings and as revealed by the affidavits, did not rest upon a violation of a contract between an employer and a labor organization, it quite correctly dismissed the action for want of jurisdiction.[3]

This court's jurisdiction of the appeal rests on 28 USCA 1291.

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[2]In their brief to this court, appellants suggest that the district court's jurisdiction may also rest upon the provisions of 28 USCA 1337 (Br. 2, 7, 37; references to Appellants' Brief are cited "Br."). The fact, however, is, as we show below, that section 1337 is not applicable to this case and, in any event, the only jurisdictional claim made in the district court was specifically bottomed on section 301(a). (Complaint, Par. 1, R. 109; references to the Record are cited "R.").

[3]Other grounds relied upon by the district court, and which equally support its order, were that exclusive jurisdiction of the matters at issue is in the National Labor Relations Board, that appellants lacked standing to sue, that appellants failed to exhaust the arbitration-grievance machinery available to them, that the Norris-LaGuardia Act (29 USCA 101) precluded the granting of injunctive relief, and that there was no jurisdiction over the individual defendants (R. 182).

II.

STATEMENT OF FACTS

This case is here on an appeal (R. 505) from an order (R. 500) dismissing appellants' fourth amended complaint.

The action was originally commenced on April 15, 1964, by a complaint for "Declaratory Relief; Mandatory Injunction; Damages" which asserted that jurisdiction of the district court was conferred by section 301(a) and by 29 USCA 401, 402 and 411.[4] At the suggestion of District Judge Wollenberg, made at oral argument on a motion to dismiss, the original complaint was amended. Two subsequent complaints asserting the same jurisdictional grounds were stricken by District Judge Weigel because each of them failed to comply with the requirements of Rule 8(a) and (e), Federal Rules of Civil Procedure. A third amended complaint, purporting to be brought "under the Declaratory Judgment Act (28 USC Sec. 2201-1); under the Injunction Act (28 USC Secs. 2282 and 2284); Section 301(a) of the Labor Management Relations Act (29 USC Sec. 185); and Title 29, Sections 401, 402(c), 411(a)(1)(2)(4)(5) USCA"[5] (R. 8) was dismissed by Chief Judge Harris on the merits and for the reasons that

> "It appearing to this court that it has no jurisdiction over the causes of action pleaded in the

[4]These references are to provisions of the Labor Management Reporting and Disclosure Act of 1959. Since the claim under the 1959 Act is not now pressed and since, in any case, that statute is clearly inapplicable, this issue is not further considered herein.

[5]Since none of these jurisdictional claims, except section 301 (a), is now pressed and since, in any case, none of them is applicable, they are not further considered herein.

> Third Amended Complaint, that exclusive jurisdiction over the alleged wrongful acts lies in the National Labor Relations Board, that this Court has no jurisdiction over the individually-named defendants, that it has no jurisdiction to issue the requested injunction due to the Norris-LaGuardia Act, that no breach of contract is or can be pleaded, that plaintiffs do not have standing to sue, that the applicable statute of limitations had expired prior to the filing of this action, and that plaintiffs, although given an opportunity to present their claim to an arbitrator, have failed and refused to do so . . .'' (R. 181-182).

An appeal from that order was taken and is presently pending in this court (No. 20301), but, so far as these appellees know, no steps have been taken to perfect that appeal.

A fourth amended complaint (the one at bench) was filed by new counsel. (R. 107). Under Rule 12, Federal Rules of Civil Procedure, appellees moved to dismiss on the grounds that the district court lacked jurisdiction and that the complaint failed to state a claim upon which relief could be granted. Affidavits were filed in support of these motions. One appellant alone filed an affidavit in opposition to the motions.

Chief Judge Harris dismissed the fourth amended complaint in an order which substantially incorporated the reasons previously assigned for the dismissal of the third amended complaint:

> ''Notwithstanding that the Fourth Amended Complaint is more artfully drafted than its predecessors, and notwithstanding that the language

and phraseology of the Fourth Amended Complaint are directly inspired by the most recent Supreme Court decisions on the subject of § 301 suits, it appears to this court that the underlying events which give rise to the allegations in the complaint, and the basic issues to which these allegations give rise, are identical to, and not different from, the events, allegations and issues involved in the Third Amended Complaint." (R. 501).

The district court's view that "no breach of contract is or can be pleaded" is clearly supported by a reading of the record.

The Fourth Amended Complaint

It is alleged in the complaint at bench that, pursuant to a collective bargaining contract between PMA and ILWU, certain rules governing the registration and deregistration of San Francisco longshoremen were adopted in 1958 (Pars. 10-11; R. 111) and,

> "That the aforesaid rules continued in full force and effect under the collective agreement aforesaid *until the adoption shortly prior to June 17, 1963 of certain new rules governing registration and deregistration of longshoremen in the Port of San Francisco* . . ." (Par. 12, R. 111; italics supplied).[6]

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[6]The "shortly prior to June 17, 1963" turns out to have been much earlier that year (Affidavit of J. A. Robertson, October 2, 1964; R. 755).

There is no doubt that, despite their present counsel's disclaimer (R. 455), appellants knew of the existence of these new rules all along. Thus, in the affidavit appended to appellants'

It is then alleged that by adopting these "new rules" appellees disregarded appellants' rights (Par. 13, R. 111; Par. 21, R. 113) and that the "new rules" were applied to appellants in an unfair manner. (Par. 38, R. 117). It is claimed that this conduct constituted a breach of "the duty of fair representation" (first and second causes of action) and resulted from a conspiracy on the part of the individual appellees to damage appellants for reasons connected with union activities (fourth and fifth causes of action). The third cause of action speaks in terms of contract violation, but it is never clear what this violation is asserted to be; indeed, reading the complaint as a whole, it is certain that the alleged contractual violation is identical with the alleged claim of a breach of the duty of fair representation.

In addition to asking for damages in sums which could aggregate *well over five million dollars* against all defendants, *including the local union,* this complaint prays for relief of a nature classically within the province of the National Labor Relations Board to give: a determination that the amended rules are invalid, an order directing appellees to cease and desist from enforcing the rules, an order for the reinstatement and promotion of appellants, an order enjoining appellees "from in any manner whatsoever interfering with the future employment of (appel-

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brief, appellant Weir refers to a meeting as early as February 26, 1963, at which he spoke with others of "the ten-hour allowable limitation" on "low-man-out violations" (Br. App. 7, 9) and to a telegram sent to the co-chairman of the joint committee on May 14, 1963, in which reference is made to "the same LMO violations *that I was charged with last February 26*" (ibid., 12; italics supplied).

lants)," an order directing appellees to make available to appellants "all facilities, rights and privileges of the jointly operated hiring hall on the same terms and conditions as applied [sic] to all other registered longshoremen," and *an order to prevent the unions from acting "as collective bargaining representatives."* (R. 121-122).

The Affidavits

The affidavits filed in support of (and, as well, the one in opposition to) the motions to dismiss establish the following:

(1) Appellants were first employed in the summer of 1959 as Class B longshoremen. Three and a half years later, early in 1963, the parties to the relevant collective bargaining contract entered into an amendment of the rules relating to Class B longshoremen. The amendment called for a review of the employment records of *all* Class B men with a view to promoting to Class A status those who met certain stated qualifications and to deregistering all others. About 450 Class B men met the standards and were advanced; about 80 men (including appellants) did not, and were deregistered.

(2) The records of *all* Class B men (not just those of appellants) were judged by certain objective criteria, insisted upon by the employer, in one instance even over the objection of the local union[7]: (a) had

[7]See *Green v. Los Angeles Stereotypers Union,* 356 F. 2d 473, where, in an analogous situation, this court approved the reversal of a local's decision by an International Union.

they committed major violations of the contract; (b) had they a record of excessive absenteeism; (c) had they cheated on the rotational system essential to the operation of the dispatch hall; and (d) had they been remiss in paying their share toward the maintenance and upkeep of the dispatch office.

(3) When the records were reviewed by a joint employer-union committee, *all* those men (not just appellants) who failed to meet the standards were notified that they were deregistered, but they were all afforded an opportunity to appear before the Joint Port Labor Relations Committee. Where errors were found, the Joint Port Labor Relations Committee corrected them. Where this Committee adhered to its original decision, the man was advised of his right to pursue the matter further through the grievance-arbitration procedures of the collective bagaining contract. Appellants were among those who initiated such grievance procedures, but, although they were specifically notified that arbitration was available to them (R. 84-85), they failed to pursue the procedures through the final step—arbitration before Professor Sam Kagel of the University of California School of Law. (R. 3).

(4) Five of the deregistered men (but not any of these appellants) filed charges with the National Labor Relations Board claiming that their deregistrations constituted an unfair labor practice. Appellants, after consulting with counsel for the National Labor Relations Board, deliberately refused to follow this route because, apparently dissatisfied with the limited

monetary redress Congress thought was proper in such cases, *they decided to attempt to mulct the employer, the unions and the union officials in damages of an astronomical order.* Subsequently, when it became apparent that the district court leaned toward the view that they should have gone to the Labor Board and after a Board Trial Examiner had rendered a favorable Intermediate Report in the case of the five who filed with the Board, appellants also filed unfair labor practice charges. Unfortunately for them, the Act's six months statute of limitations (29 USCA 160[b]) had run, and their charges were held time-barred.[8] In the case of the five who had filed with it, the Labor Board ultimately ruled, on the merits, that the deregistrations did not constitute any unfair labor practices. (*Pacific Maritime Association and International Longshoremen's and Warehousemen's Union, Local No. 10* [*Johnson Lee*], 155 NLRB No. 117, 60 LRRM 1483).[8a]

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[8]The Regional Director, acknowledging that the charges related to the "commission of . . . [a]cts arguably constituting unfair labor practices", refused to issue a complaint because section 10(b) of the Act (29 U.S.C.A. 160[b]) barred further proceedings (R. 180b). On appeal, the General Counsel sustained this ruling and advised that "[*w*]*ith respect to the charging parties' contention on appeal that the limitations period should be extended, the Board has no statutory authority to comply with this request.*" (R. 499; italics supplied).

[8a]Section 10(f) of the Act provides that "Any person aggrieved by a final order of the Board granting or *denying* in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in . . ." (29 USCA 160[f]; italics supplied). A Board order *dismissing* a complaint is reviewable under this section. *Jacobsen v. National Labor Relations Board,* 120 F. 2d 96.

III.

SUMMARY OF ARGUMENT

(1) The district court had no jurisdiction of this case because Congress has vested the National Labor Relations Board with exclusive jurisdiction to hear and decide appellants' claims. *Garner v. Teamsters Union,* 346 U.S. 485; *San Diego Building Trades Council v. Garmon,* 359 U.S. 236; *Local 100, United Association of Journeymen v. Borden,* 373 U.S. 690; *Local No. 207, International Association of Bridge etc. Workers v. Perko,* 373 U.S. 701.

(2) *Smith v. Evening News Association,* 371 U.S. 195 and *Humphrey v. Moore,* 375 U.S. 335, which create a narrow exception to the foregoing doctrine of preemption, do not apply here, since this case is not really one for breach of a collective bargaining contract but rather is based upon a claim that the application to appellants of a jointly agreed-upon modification to the contract is somehow "unfair." Furthermore, the National Labor Relations Board has already rejected claims that appellees' conduct was unlawful, and "serious problems" (*Smith v. Evening News Association, supra* at 197) would arise if the district court were to assume jurisdiction and to reach a contrary result.

(3) The vast differences between the Railway Labor Act (45 USCA 151 et seq.) and the National Labor Relations Act (29 USCA 151 et seq.) make totally inapposite the cases which arose under the former statute. Furthermore, since the National Labor Relations Board did not afford relief for racial

(as distinguished from "union") discrimination when *Syres v. Oil Workers International Union,* 350 U.S. 829, was decided, that decision is equally inapposite to the issues raised here.

(4) In any case, appellees have no standing to sue because they exhausted neither the grievance machinery available to them under the contract nor the administrative machinery available to them under the National Labor Relations Act.

(5) The other principal grounds relied upon by the district court, i.e. that individual union officers are not liable for damages in cases of alleged breach of contract, and that the Norris-LaGuardia Act (29 USCA 101) deprives the district court of jurisdiction to grant injunctive relief, are equally valid. *Atkinson v. Sinclair Refining Co.,* 370 U.S. 238; *Sinclair Refining Co. v. Atkinson,* 370 U.S. 195.

IV.

ARGUMENT

A. THE DISTRICT COURT HAD NO JURISDICTION OVER APPELLANTS' CLAIMS.

1. Exclusive Jurisdiction Over Those Claims Was Vested in the National Labor Relations Board.

> *"One of the central principles of our National Labor law has been the relegation to the National Labor Relations Board of the primary responsibility for the enforcement of employer and employee duties under such law."* (*Chasis v. Progress Manufacturing Company, Inc.,* 256 F. Supp. 747, 749)[9]

The major policies behind this salutary rule are (1) the fear that a multiplicity of tribunals and procedures will result in incompatible or conflicting adjudications leading to confusion in this important area of national life (*Garner v. Teamsters Union,* 346 U.S. 485) and (2) the recognition that Congress has made an affirmative decision to entrust the administration of national labor policy to a centralized agency armed with its own special procedures and equipped with its own special expertise. (*San Diego Building Trades Council v. Garmon,* 359 U.S. 236).

Appellants' charges as revealed by this record, both in the pleadings and in the affidavits, make out a claim that sections 8(a)(1) and (3), and, possibly, (2) of

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[9]This very recent opinion of Chief Judge Clary of the Eastern District of Pennsylvania contains one of the clearest expositions of the principles of law applicable to the instant case which we have yet seen. In another recent decision, rendered while this

the National Labor Relations Act were violated by the employer and that sections 8(b)(1)(A) and (2) were violated by the unions.[10]

In *Local 100, United Association of Journeymen and Apprentices v. Borden,* 373 U.S. 690, the court said:

> "Thus the first inquiry, in any case in which a claim of federal preemption is raised, must be whether the conduct called into question may reasonably be asserted to be subject to Labor Board cognizance.
>
> "In the present case, respondent contends that no such allegation can be made, but we disagree. The facts as alleged in the complaint, and as found by the jury, are that the Dallas union business agent, with the ultimate approval of the local union itself, refused to refer the respondent to a particular job for which he had been sought, and that this refusal resulted in an inability to obtain the employment. Notwithstanding the state court's contrary view, if it is assumed that the refusal *and the resulting inability to obtain employment* were in some way based on respond-

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brief was in the course of preparation, the Court of Appeals for the Eighth Circuit, in an opinion by Judge Mehaffy which is dispositive of many of the issues in the case at bench, unanimously affirmed the dismissal for want of jurisdiction *(Woody v. Sterling Aluminum Products, Inc.,* 243 F. Supp. 755; *Woody v. Sterling Aluminum Products, Inc.,* 244 F. Supp. 84) of complaints in no significant way different from the complaint at bench. *Woody v. Sterling Aluminum Products, Inc.,* 365 F. 2d 448. See also *Brown v. Sterling Aluminum Products Corporation,* 365 F. 2d 651.

[10]These sections read, in relevant part, as follows:

"8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of this Act;

(2) to dominate or interfere with the formation or admin-

ent's actual or believed failure to comply with internal union rules, it is certainly 'arguable' that the union's conduct violated §8(b)(1)(A), by restraining or coercing Borden in the exercise of his protected right to refrain from observing those rules, and §8(b)(2), by causing an employer to discriminate against Borden in violation of §8(a)(3)." (at 694; italics in original)

And in *Local No. 207, International Association of Bridge, etc. Workers Union v. Perko,* 373 U.S. 701, the court said:

". . . Perko's complaint—that the petitioners caused his discharge and prevented his subsequent employment as a foreman as well as a superintendent—falls within the ambit of the unfair labor practices prohibited by §§8(b)(1)(A) and 8(b)(2) of the Act. And since petitioners' actions apparently resulted from Perko's violation of a union rule, there is a reasonable likelihood that on these premises the Board would have found such unfair labor practices to have been committed." (at 706-707).

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istration of any labor organization or contribute financial or other support to it . . . ;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."

"8(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce . . . employees in the exercise of the rights guaranteed in Section 7 of this Act . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated . . ."

In a long series of cases, the National Labor Relations Board has taken jurisdiction over claims identical with those asserted here and, when such claims have been properly established, has given to the persons aggrieved the relief provided for by the Congress in section 10(c) of the Act (29 USCA 160[c].)[11] *Miranda Fuel Co.,* 140 N.L.R.B. 181; *Independent Metal Workers Union, Local No. 1,* 147 N.L.R.B. 1573; *Local 1367, International Longshoremen's Assn.,* 148 N.L.R.B. 897; *International Union, United Automobile Workers,* 149 N.L.R.B. 482; *Local Union No. 12, United Rubber etc. Workers,* 150 N.L.R.B. 312.[12, 12a]

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[11]This section reads, in relevant part, as follows:

". . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any . . . unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: PROVIDED, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: . . ."

[12]As pointed out above, the National Labor Relations Board did take jurisdiction in the case of five other deregistrants, although, *on the merits,* it found that there had not been any unfair labor practices committed (*Pacific Maritime Association and International Longshoremen's and Warehousemen's Union, Local No. 10* [*Johnson Lee*], 155 NLRB No. 177, 60 LRRM 1483).

[12a]After this brief was in galley, counsel learned that the Board's order in *Local Union No. 12, supra,* had been enforced by the Court of Appeals for the Fifth Circuit in an opinion which establishes without any question that a "breach of duty of fair representation", *infra,* is an unfair labor practice within the jurisdiction of the National Labor Relations Board. *Local Union No. 12 v. National Labor Relations Board,* 368 F. 2d 12.

This court (*National Labor Relations Board v. District Council of Painters, No. 52 etc.,* 363 F. 2d 204), as well as other courts of appeals (*National Labor Relations Board v. Local 269, International Brotherhood of Electrical Workers,* 357 F. 2d 51; *cf. Barunica v. United Hatters, etc., Local Number 55,* 321 F.2d 764), has enforced Board orders in such cases.

As the Supreme Court said in the *Garmon* case:

> "It is not for us to decide whether the National Labor Relations Board would have, or should have, decided these questions in the same manner. When an activity is arguably subject to §7 or §8 of the Act, the States *as well as the federal courts* must defer to the exclusive competence of the National Labor Relations Board if the danger of . . . interference with national policy is to be averted." (359 U.S. at 245; italics supplied).[13]

2. This Case Does Not Arise Under Section 301 of the Labor Management Relations Act.

Appellants' attempt to extricate themselves from the inevitable conclusion that their sole remedy was with the Labor Board by suggesting that section 301 confers jurisdiction upon the district court is untenable.[13a]

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[13]For more recent expressions of this view, see *Liner v. Jafco,* 375 U.S. 301, 306-307 and *Radio and Television, etc., Local Union v. Broadcast Service of Mobile, Inc.,* 380 U.S. 255, 257; *cf., Beausoliel v. United Furniture Workers,* ..... N.H. ....., 64 LRRM 2174 (November 30, 1966).

[13a]In considering the relationship between the unfair labor practice provisions of the National Labor Relations Act and section 301, the Supreme Court on January 9, 1967, emphasized that section 10(a) of the Act (29 USCA 160[a]) provides that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, *law* or otherwise . . ." (*National Labor Relations Board v. Acme Industrial Company,* ..... U.S. ..... at .....; 35 U.S. L. WEEK 4103 at 4105; 64 LRRM 2069 at 2071; italics supplied).

(a) The record does not reveal a cause of action for violation of a collective bargaining contract.

Appellants assert that their third cause of action alleges a breach of the collective bargaining contract and contend that section 301 gives the district court jurisdiction over that cause of action (Br. 9, 56-67).

It is true that the third cause of action, as Chief Judge Harris observed of the entire complaint, is "artfully drafted" and apparently was "directly inspired by the most recent Supreme Court decisions on the subject of §301 suits" (R. 501). But, while the third cause of action incorporates by reference some twenty of the thirty-three paragraphs of the first cause of action (Par. 34, R. 116), it conspicuously neglects to incorporate paragraphs 12 (R. 111) and 21 (R. 113) of the said first cause of action, which reveal that the collective bargaining contract, the *breach* of which is alleged as the basis for the third cause of action, was, in fact, *modified* by the parties thereto some time prior to the conduct which is claimed to constitute the breach![14] The allegations of "breach" (Pars. 46 and 47 [R. 119]) are in the barest and most conclusionary form which, in the light of the whole record, the district court was not bound to accept.[15]

The question, in view of the entire record, was whether appellants were truly claiming a breach of

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[14]The record shows the modification to have taken place months prior to the deregistration of appellants, *supra,* n. 6.

[15]Compare this court's rejection of similar "bare" allegations in *Hardcastle v. Western Greyhound Lines,* 303 F. 2d 182 and *Colbert v. Brotherhood of Railway Trainmen,* 206 F. 2d 9.

contract or, rather, were complaining that the contract had been *amended* and was being *applied* in claimed breach of their rights. The district court had the right to read the allegations of the third cause of action in the light of the entire record before it and to know that, while the third cause of action *purported* to refer to the "breach" of a collective bargaining contract executed in 1961 (Pars. 10, 47 [R. 111, 119]), that contract had in fact been modified by the parties "prior to June 17, 1963". (Par. 12 [R. 111]). Indeed, it might be argued that the third cause of action must, on its face, have been dismissed as moot since it attempted to allege a breach of a collective bargaining contract the relevant terms of which had in fact been modified before the alleged breach.

But the district court was not required to read the pleadings in so strained a manner—either against or for appellants. It had the right to conclude, construing the record as a whole, that the thrust of the charge against appellees was, not that they had breached the contract, but that they had *modified* it and *applied* it with the result that appellants were deregistered. Since appellants insist that the motions be treated as motions for summary judgment under Rule 56, Federal Rules of Civil Procedure (Br. 27), they can hardly complain if their third cause of action is read in the light of the whole record. So read, it shows that the contract in existence in June of 1963 was not the contract which they claimed was breached, but was a contract which had been previously modified by the parties and, as modified, had been applied to appellants *and all other B registrants* in June of 1963.

The record therefore does not reveal a cause of action for "violation of [a] contract between an employer and a labor organization". It shows an objection to the fact that the employer and the labor organization amended the contract and a contention that the amended contract should not have been applied to appellants. This, however, does not give rise to jurisdiction under section 301.

That appellants *purport* to state their claim in terms of breach of contract does not change the situation. It is the substance of their claim, not the form which they seek to give it, which governs.

> "Nor do we regard it as significant that Borden's complaint against the union sounded in contract. . . . *It is not the label affixed to the cause of action . . . that controls . . .*
>
> "In the present case the *conduct* on which the suit is centered, whether described in terms of tort or contract, is conduct whose lawfulness could initially be judged only by the federal agency vested with exclusive primary jurisdiction . . ." (*Local 100, United Association of Journeymen and Apprentices v. Borden,* 373 U.S. 690, 698; italics in original).[15a]

[15a] Referring to this very language, the Court of Appeals for the Fifth Circuit, in *Local Union No. 12, supra,* n. 12a said:

> ". . . the Supreme Court recently ruled that even though an employee claim is couched in terms of breach of contract, *if the claim is based essentially on union interference* with 'employment relations' it must be first presented to the Board since it may arguably involve an unfair labor practice. Accord, Local 207, International Ass'n of Bridge Workers v. Perko, 1963, 373 U.S. 701, 83 S.Ct. 1429, 10 L.Ed.2d 646. This extension of the preemption doctrine appears equally applicable *to employee claims based essentially on a breach of the duty of fair representation* to the extent that these claims often involve union interference with 'employment relations.'" (368 F. 2d at 23; italics supplied).

(b) The law does not support appellants' claim that they have a cause of action under section 301.

(i) Smith v. Evening News Association, 371 U.S. 195 and the related cases.

Appellants spend something like 15 pages (56-70) of their excessively long brief arguing that where a case does indeed present a claim of contract violation, the courts have concurrent jurisdiction with the National Labor Relations Board—a proposition which we have never controverted. To erect a straw man and then knock it down does not advance analysis of the problem at bench. The only real question is: Does the case at bench, fairly interpreted, present a suit for breach of contract or is it something else again to which appellants have attempted to affix a "301" label?

The *Smith v. Evening News Association,* 371 U.S. 195, line of cases is relevant, not to "distinguish" the "preemption" cases, but to show what the courts have said really constitutes a violation of contract under section 301.

That section, it will be recalled, gives the district courts jurisdiction over "suits for violations of contracts between an employer and a labor organization . . ." It is a *sine qua non* of its invocation, as a basis for jurisdiction, that there be at the very least a real claim of contract violation.

In *Smith,* the court held the cause of action rested on section 301 because the employer's refusal to pay full wages to the plaintiff *"violated a clause in the* [*collective bargaining*] *contract."* (at 196; italics sup-

plied). Indeed it was not seriously argued in *Smith* (as it is by appellees here) that the suit did not involve a breach of contract. On the contrary, the argument was (1) that, *conceding the breach,* the allegations made out an unfair labor practice and hence the subject matter was within the exclusive jurisdiction of the Labor Board (at 196), and (2) that an action by an individual employee to recover wages was not maintainable under section 301 since (a) the subject matter of the suit was "uniquely personal" to the employee, and (b) only parties to the contract may maintain a suit on it. (at 198).

As to the first point, the court held that the Board's authority to deal with an unfair labor practice *"which also violates a collective bargaining contract"* does not destroy the jurisdiction of the court under section 301. (at 197; italics supplied). Obviously, it follows that there is no jurisdiction in the district court unless there is a breach, whether or not there is an unfair labor practice; conversely, there must be a breach, whether or not there is an unfair labor practice, before there is such jurisdiction. As to the second point, the court held that an individual employee might, in a proper "breach of contract" case, maintain a suit under section 301 even for a claim so "uniquely personal" to him as the payment of wages. It emphasized throughout its discussion, however, that the predicate for this—or any—suit under section 301 was a "violation of collective bargaining contracts" (at 199), and a "breach of a collective bargaining contract." (at 200). *Smith* does not hold that every

complaint of unfair treatment is cognizable under section 301. Indeed, it is careful to point out that only suits for *breach* of collective bargaining *contracts* fall within the ambit of that section.

Any other construction of the section would do violence to its language and would do great mischief by vesting the courts with jurisdiction over matters which Congress has clearly reserved for the National Labor Relations Board. Indeed, the court in *Smith* acknowledged that there might be "situations in which serious problems will arise from both the courts and the Board having jurisdiction over acts which amount to an unfair labor practice. . . ." (at 197-198). But because it did not regard the case then before it as presenting such a problem (and it noted that the Labor Board was in accord), it said it would leave the resolution of that issue to another day. (at 198).

But what about the instant case? Here the Board has already ruled, in the case of five persons identically situated as are appellants, that appellees' conduct was not illegal. It has also ruled that any claims these very appellants may have had were not timely presented. Is a United States district court, under the guise of disposing of a breach of contract claim, to arrive at different conclusions on either of these questions?

Judge Clary faced this same problem in *Chasis v. Progressive Manufacturing Company, Inc.*, 256 F. Supp. 747, and resolved it as follows:

> "We are, therefore, led to the conclusion that the heart of plaintiffs' alleged injury lies solely in an

> alleged unfair labor practice, the existence of which as to several plaintiffs has already been adjudicated by the National Labor Relations Board. To allow plaintiffs . . . to relitigate the same question in this Court by broadly alleging a breach of the collective bargaining agreement would seem to conflict with the basic structure of our labor law. For these reasons, the complaint must be dismissed." (at 753).

An earlier case in the Third Circuit (*Smith v. Pittsburgh Gage & Supply Co.,* 245 F. Supp. 864, aff'd per curiam 361 F. 2d 219) was said by him to indicate a refusal on the part of that court "to allow suits broadly alleging breach of contract to needlessly circumvent the Congressional policy of the primary jurisdiction of the National Labor Relations Board." (at 752).

The Eighth Circuit Court of Appeals has, within the last months, held the same way:

> "Our remaining jurisdictional issue concerns those allegations . . . charging the Union with conspiring and colluding with Sterling, bargaining in bad faith to plaintiffs' detriment, and failing to represent plaintiffs fairly and honestly. The District Court held that the plaintiffs' charges of the Union's bad faith in negotiating the collective bargaining agreement were not predicated upon the collective bargaining agreement so as to give the court jurisdiction under §301, but rather looked beyond the agreement to the exclusive bargaining representatives' obligation of fair representation and was within the exclusive jurisdiction of the National Labor Relations Board. We think this holding was correct.

San Diego Bldg. Trades Council v. Garmon, supra; Local No. 100 v. Borden, 373 US 690, 83 S.Ct. 1423, 10 L. Ed. 2d 638 (1963); Local No. 207 v. Perko, 373 US 701, 83 S.Ct. 1429, 10 L. Ed. 2d 646 (1963). We think it is at least arguable that these allegations, if true, would be an unfair labor practice within the protection of §7 and prohibition of §8 of the Act 'although there are differing views on whether a violation of the duty of fair representation is an unfair labor practice under the Labor Management Relations Act . . .[15b] Humphrey v. Moore, 375 US 335, 84 S.Ct. 363, 11 L. Ed. 2d 370 (1964). Unlike Moore, however, plaintiffs' allegations here are not contract oriented and not, therefore, 'within the cognizance of federal and state courts.' Smith v. Evening News Ass'n, supra.

"Although *Garmon, Borden* and *Perko* involved complaints based upon a state cause of action and are not controlling in cases involving alleged violations of federal law, they are guidesome in determining the extent of §301 jurisdiction and 'when, for what kinds of breach and under what circumstances, an individual employee can bring a 301 action.' Smith v. Evening News Ass'n, supra, 371 US at 204, 83 S.Ct. at 272, 9 L.Ed. 2d 246 (Mr. Justice Black dissenting).

"*No precedent has been called to our attention and our research has revealed none that would vest the federal courts with jurisdiction under such circumstances as exist here.* INDEED, TO RULE JURISDICTION MIGHT WELL JEOPARDIZE THE WHOLE CONCEPT OF COLLECTIVE BARGAINING AS WE KNOW IT. WE ARE NOT PREPARED TO PIO-

[15b]But see *Local No. 12, supra,* n. 12a. (Our footnote).

NEER THE ALLOWANCE OF SO DRASTIC A STEP *and, for this as well as the other reasons hereinbefore expressed, the judgment of the District Court is affirmed.*" (*Woody v. Sterling Aluminum Products, Inc.*, 365 F. 2d 448, 456-457; italics and capitalization supplied).

This court anticipated these holdings in *Alexander v. Pacific Maritime Association*, 314 F. 2d 690. There, although granting leave to amend a complaint because *Smith* came down while the case was pending (at 692, 695), the court noted that the acts complained of—alleged discrimination by failure to register certain clerks (at 691) with a resulting loss of fringe benefits (at 694)—did not constitute a breach of the collective bargaining contract. With respect to the differences between a union's obligations under a contract and its duty fairly to treat the employees involved, this court said:

"Appellants' case for a breach of contract, as we understand it, is restricted to this: that under § 14 the registered list is to be maintained at such dimensions as will meet the needs of the Port of San Francisco; that it is not so maintained; that if it were, then under § 15 these appellants would be registered; that the failure of the joint committee to register these appellants is thus a breach of contract.

"But the contract as alleged does not say this. There is no promise to maintain the registration at any level. The parties to the agreement may demand additions to meet the needs of the port, but there is no allegation that such a demand has been made. It may be that Local 34 owes these

> appellants a duty to make such a demand (they themselves having demanded registration), *but if so such duty springs from the local's relationship to these appellants* AND NOT FROM THE TERMS OF THE COLLECTIVE BARGAINING AGREEMENT." (314 F. 2d at 694; italics and capitalization supplied).[16]

More recently, this court has remarked upon the fact that the Labor Board is not deprived of its primary jurisdiction over a controversy merely because it involves a collective bargaining contract cast in the language of the statute.

> "Where the . . . provisions of a collective bargaining agreement do no more than . . . prohibit conduct already defined and forbidden by the Act as an unfair labor practice, *the Board can never be ousted of jurisdiction,* for the reason that the controversy would involve no more than a breach of these negative contract provisions—*a violation of duty already 'imposed directly by the* Act', irrespective of the contract itself. Were it otherwise, it would be a simple matter to remove from the jurisdiction of the Board all unfair labor practice disputes, by the facile device of prohibiting in the collective bargaining contract all unfair labor practices defined in the Act." (*National*

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[16]The subsequent course of *Alexander* is that, after the complaint was amended, the district court ordered proceedings stayed "pending disposition of the case on arbitration"; that an appeal from that order was dismissed by this court (*Alexander v. Pacific Maritime Association,* 332 F. 2d 266); and that certiorari was thereafter denied. (*Alexander v. Pacific Maritime Association,* 379 U.S. 882).

On the question of the necessity to exhaust grievance-arbitration procedures as a pre-condition to the maintenance of a suit under section 301, see *infra,* pages 54-58.

Labor Relations Board v. C. & C. Plywood Corporation, 351 Fed. 2d 224, 227; italics supplied.[16a]

Since the case at bench is, in essence, one for an alleged breach of the duty of fair representation, the Board may not be ousted of its jurisdiction simply because the pleader seeks to cast it in terms of contract violation. Like the contract itself, the pleading should not be permitted to oust the Board of a jurisdiction which it has or to invest a court with a jurisdiction which it does not have.

The earlier cases upon which it is said that *Smith* was built (Br. 56), *Dowd Box Co. v. Courtney,* 368 U.S. 520, and *Local 174, Teamsters Union v. Lucas Flour Co.,* 369 U.S. 95, clearly illustrate the point we make—that section 301 applies to cases truly involving claims of contract breach and not to cases where the gravamen of the charge is in truth an unfair labor practice.

[16a]The Supreme Court's reversal (*National Labor Relations Board v. C & C Plywood Corp.,* ..... U.S. .....; 35 U.S. L. WEEK 4105; 64 LRRM 2065 [January 9, 1967]) of this Court's refusal to enforce the Board order in this case does not detract from the force of the language quoted in the text. Indeed, the Supreme Court's *Plywood* decision emphasizes the correctness of these views of this Court, for, despite the fact that a collective bargaining contract was involved in that case, the Court said:

> "The legislative history of the Labor Act, the precedent interpreting it, and the interest of its efficient administration thus all lead to the conclusion that the Board had jurisdiction to deal with the unfair labor practice charge in this case." (35 U.S. L. WEEK at 4108; 64 LRRM at 2068).

In *Dowd Box* the only question resolved was that a state court had concurrent jurisdiction with a federal court in a 301 suit. (368 U.S. at 504). There was no question that the case did in fact present a genuine claim for breach of a collective bargaining contract. This was not denied, and the court's summarization of the record leaves no doubt on the point:

> "A few weeks before the expiration of a collective bargaining agreement in 1957, negotiations were initiated between representatives of the union and of the petitioner with respect to proposals which the union had submitted for a new agreement. After a number of negotiating sessions, *a 'Stipulation' was signed by representatives of each party,* continuing in effect many provisions of the old agreement, but *providing for wage increases and making other changes with respect to holidays and vacation.*[17] The terms of the 'Stipulation' were later embodied in a draft of a proposed new agreement. The petitioner originally announced to its employees that it would put into effect the wage changes and other provisions covered by the 'Stipulation' and draft agreement, but *a few weeks later notified its employees of its intention to terminate these changes* and return 'to the rates in effect as of May 18, 1957' . . .
>
> "The present action was then brought in the Superior Court of Massachusetts for Worcester County by the respondents, local union officers and a staff representative of the International

[17]It is interesting to note that in *Dowd Box* no question was raised concerning the right of the parties to the collective bargaining contract to amend or modify it. This point is discussed, *infra,* pages 35-39.

> Union. The complaint . . . *asked for a judgment declaring that there existed a valid and binding collective bargaining agreement, for an order enjoining the company from terminating or violating it, and for an accounting and damages.*" (at 504; italics supplied).

There was no basis for any suggestion that in *Dowd Box,* the conduct of the employer constituted, even "arguably", an unfair labor practice.

Similarly, *Local 174, Teamsters Union v. Lucas Flour Company,* 369 U.S. 95, was, without question, an action for breach of contract, the relevant terms of which are set forth in *haec verba* at the very outset of the court's opinion. (at 96). The union, contrary to the express provisions of the contract that, pending arbitration of grievances, "there shall be no suspension of work" (ibid.), called a strike to force the employer to rehire a discharged employee during the very time that a grievance concerning his discharge was in progress. The employer sued in the state court for damages caused by the strike. The recently rendered decision in *Dowd Box* compelled the conclusion that the state court had jurisdiction. The only other questions the court considered were whether in such a case the state court was free to apply state law (it held that federal law had to be applied) and whether, as a matter of the applicable law, the strike, in the face of the contract provisions, was, as claimed, a breach of contract. As to the latter point, the court said:

> "The grievance over which the union struck was, AS IT CONCEDES, *one which it had expressly*

> *agreed to settle by submission to final and binding arbitration proceedings.* The strike which it called *was a violation of that contractual obligation."* (at 106; italics and capitalization supplied).

In *Lucas Flour* the record revealed a clear breach of an identified section of a collective bargaining contract. It revealed conduct which was and could have been nothing but such a breach. By no stretch of the imagination could the strike have been regarded as a matter within the competence of the Labor Board. Under those circumstances it is not surprising that the applicability of section 301 to the controversy was not challenged.

In none of the foregoing cases was it contended (as it is here) that the claim was anything other than that the contract had been breached.

Here, to the contrary, the district court had the right to find from the entire record before it that, in truth and in fact, "no breach of contract is or could be pleaded" (R. 501), but that appellants' claim "rather looked beyond the agreement to the exclusive bargaining representatives' obligation of fair representation and was within the exclusive jurisdiction of the National Labor Relations Board." (*Woody v. Sterling Aluminum Products, Inc.,* 365 F. 2d 448, 456).

(ii) Humphrey v. Moore, 375 U.S. 335.

Humphrey v. Moore, 375 U.S. 335, does not mark, nor was it intended to mark, any departure from the principles of *Smith, Dowd Box* and *Lucas Flour:* that

before a court has jurisdiction of a suit under section 301, it must be clear that the claim is based on a breach of contract and not simply on conduct which is, solely, essentially (or even "arguably") an unfair labor practice.

In *Humphrey,* the claim was that a decision of a joint employer-union committee was "violative of the collective bargaining contract" (at 340), because neither the parties to the contract nor the joint committee "has any power beyond that delegated to them by the precise terms of section 5 [of the contract]." (at 342). It was this claim of the violation of a specific contract clause which led the trial court to conclude that "this is an action to enforce a collective bargaining contract" (at 341)—an observation which the Supreme Court characterized as "accurate." (ibid.). Thus, *Humphrey* sustains 301 jurisdiction where, and only where, the conduct of the defendants is in *breach* of contract.[18]

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[18]Note Judge Clary's statement that, in *Humphrey v. Moore,* the record showed that "specific provisions of the collective bargaining contract" were breached and that there was "little question" that *the "real essence of the action"* was breach of contract (*Chasis v. Progress Manufacturing Company, Inc.,* 265 F. Supp. 747, 751; italics supplied) as well as Judge Mehaffy's observation that *Humphrey* was "contract oriented." (*Woody v. Sterling Aluminum Products, Inc.,* 365 F. 2d 448, 456). In *Local Union No. 12, supra,* n. 12a, the court, citing both *Humphrey* and *Smith, supra,* said that ". . . if the claim of an aggrieved employee is based *essentially* on breach of contract . . . the courts may entertain the controversy". (368 F. 2d at 22; italics supplied).

Note, also, that in *Humphrey* itself the majority explicitly said:

> "We need not consider the problem posed if § 5 had been omitted from the contract or *if the parties had acted to amend the provision*". (375 U.S. at 345, n.7; italics supplied).

While Justices Goldberg, Brennan and Harlan took a somewhat different view of the case, they did not suggest that jurisdiction *under 301* could rest on anything except a contract breach. Mr. Justice Goldberg, with Mr. Justice Brennan concurring, believed that an amendment to a contract could not be a "breach":

> "A mutually acceptable grievance settlement between an employer and a union . . . cannot be challenged by an individually dissenting employee under 301(a) on the ground that the parties exceeded their contractual powers in making the settlement." (at 352).

From his vast experience in labor law, Mr. Justice Goldberg was of the view that the contracting parties

> "were free to resolve the dispute by amending the contract to dovetail seniority lists or to achieve the same result by entering into a grievance settlement. The presence of the merger-absorption clause did not restrict the rights of the parties to resolve their dispute by joint agreement applying, interpreting, or amending the contract. *There are too many unforeseeable contingencies in a collective bargaining relationship to justify making the words of the contract the exclusive source of rights and duties.*" (at 353-354; italics supplied).[18a]

[18a] See *National Labor Relations Board v. C & C Plywood Corp.*, *supra*, n. 16a, where the Court said:

> "For the law of labor agreements cannot be based upon abstract definitions unrelated to the context in which the parties bargained and the basic regulatory scheme underlying that context. See Cox, The Legal Nature Of Collective Bargaining Agreements, 57 Mich. L. Rev. 1 (1958)." (35 U.S. L. WEEK at 4108; 64 LRRM at 2069.)

Mr. Justice Goldberg pointed out that in *Ford Motor Company v. Huffman,* 345 U.S. 330,

> ". . . this Court held that the existing labor agreement did not limit the power of the parties jointly, in the process of bargaining collectively, to make new and different contractual arrangements affecting seniority rights.
>
> "It necessarily follows from Huffman that a settlement . . . deemed by the parties to be an interpretation of their agreement, not requiring an amendment, is plainly within their joint authority. Just as under the Huffman decision an amendment is not to be tested by whether it is within the existing contract, so a . . . settlement should not be tested by whether a court could agree with the parties' interpretation. If collective bargaining is to remain a flexible process, the power to amend by agreement and the power to interpret by agreement must be coequal." (at 354-355).

Mr. Justice Goldberg, however, did not mean to suggest that the individual employee is without a remedy for "a union's breach of its duty of fair representation." (at 355). He insisted, however, that such a remedy did not arise under section 301.[19]

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[19]Mr. Justice Harlan accepted this analysis and cogently raised the next question:

> "Does such a federal cause of action [for breach of the duty of fair representation] come within the play of the pre-emption doctrine, San Diego Trades Council v. Garmon, 359 U.S. 236, contrary to what would be the case were such a suit to lie under Section 301, Smith v. Evening News Ass'n, 371 U.S. 195?" (375 U.S. at 360).

For reasons discussed below, we submit that it does and that the vast differences between the Railway Labor Act (45 USCA 151

Since the majority viewed the case as properly involving a breach of contract issue, the sustaining of jurisdiction in *Humphrey v. Moore* is perfectly understandable. (See, *supra,* n. 18) We have yet to be pointed to a single case in the Supreme Court, or in any other court, in which section 301 jurisdiction has been sustained upon a charge only that the duty of fair representation had been breached or that the parties had amended and applied (as distinguished from breached) their collective bargaining contract. Certainly, no case has ever held that section 301 may be invoked to give jurisdiction over what is really nothing more than an unfair labor practice claim merely because the claimants, dissatisfied with the relief available to them under the Congressional statute, failed timely to file charges with the Board (compare *Anson v. Hiram Walker & Sons, Inc.,* 248 F. 2d 380, 381) and then sought to dress up their claim as one of contract breach.[20]

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et seq.) under which the *Steele* line of cases (Br. 30-52) arose, and the National Labor Relations Act (29 USCA 151, et seq.), which is applicable here, compel this conclusion.

In *Local Union No. 12, supra,* n. 12a, the court said:

> "The critical area requiring jurisdictional readjustment will involve those controversies, such as the instant case, where the aggrieved employee's claim is not founded on a breach of the bargaining contract, but rather is based squarely on an alleged violation of the union's duty of fair representation. In this situation, the unfair labor practice jurisdiction of the Board will apparently be exclusive, totally preempting that of the courts. San Diego Bldg. Trades Council v. Garmon, *supra.*" 368 F. 2d at 22.

[20]Appellants discuss several lower court decisions (Br. 59-68) which we think can be disposed of briefly since they are all illustrations of the principles already considered. Thus *Plumbers and Steamfitters Union v. Dillion,* 255 F. 2d 820, involved the breach

(iii) An amendment to a collective bargaining agreement jointly agreed upon by the parties thereto is not a "violation" of the contract.

We have already adverted to the views expressed in *Humphrey v. Moore,* 375 U.S. 335 by Mr. Justice Goldberg on this question—views which were bottomed on the unanimous opinion in *Ford Motor Co. v. Huffman,* 345 U.S. 330. There is nothing in *Humphrey v. Moore* to indicate that Mr. Justice White and those for whom he spoke intended any disagreement with *Huffman.* To the contrary, Mr. Justice White's opinion refers to that case with evident approval. (375 U.S. at 349).

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by a union of a contract to supply labor; *Todd Shipyards v. Industrial Union,* 344 F. 2d 107, involved an employer's breach of a clause against subcontracting; *Gilmour v. Wood etc. Union,* 223 F. Supp. 236, like *Lucas Flour,* was a case in which the union struck in violation of a no-strike clause in the contract (*Gilmour* has relevance, though, on other points, to the case at bench: citing *Atkinson v. Sinclair Refining Co.,* 370 U.S. 238, it dismissed the suit against the *individual* defendants [see *infra*] and, citing *Sinclair Refining Co. v. Atkinson,* 370 U.S. 195, it denied the injunctive relief sought because of the Norris-LaGuardia Act [29 USCA 101]); *Fuller v. Highway Truck Drivers, etc., Local,* 233 F. Supp. 115, and *Regan v. Ohio Barge Lines, Inc.,* 227 F. Supp. 1013, are both *Humphrey v. Moore* type cases involving problems arising from the merging of seniority lists. (*Regan* has this relevance to the case at bench, however: it emphasizes the need for plaintiffs to exhaust contract remedies before they have standing to sue under Section 301 [227 F. Supp. 1014] and, like *Gilmour, supra,* in reliance on *Atkinson,* it dismissed the suit against the individual defendants).

Finally, neither *National Labor Relations Board v. Pennwoven, Inc.,* 194 F. Supp. 521, nor *Fibreboard Paper Products Corp. v. East Bay Union of Machinists,* 344 F. 2d 300, was a suit under section 301. *Pennwoven* was concerned with the applicability of the six-month period of limitations contained in 10(b) of the Act (29 USCA 160 [b]) and *Fibreboard* with a problem of collateral estoppel. Neither case contributes in any way toward a proper analysis of the problems at bench.

In *Huffman,* the court had before it an amendment to a collective bargaining contract which, because it retroactively took away employees' seniority status (345 U.S. at 335; *Huffman v. Ford Motor Co.,* 195 F. 2d 170, 172), was claimed to be beyond the power of the bargaining agent. (345 U.S. at 332).

With respect to the union's contention that the district court had no jurisdiction over the case because it involved a claim of unfair labor practice and "the National Labor Relations Act . . . vests initial jurisdiction over such an issue exclusively in the National Labor Relations Board", the court noted that the "question was not argued in the Court of Appeals or mentioned in its opinion and, in view of our position on the merits, it is not discussed here." (at 332, n. 4). The court, however, did observe that

> "Our decision interprets the statutory authority of a collective-bargaining representative to have such breadth that it removes all ground for a substantial charge that the International, by exceeding its authority, committed an unfair labor practice." (at 332, n. 4).

The court's conclusion that a union does not exceed its statutory authority by entering into an amendment to a collective bargaining contract has great relevance for the case at bench. In addressing itself to this question, and in reversing the court of appeals upon it, the court said:

> "Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and

accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposals.

* * * * *

"Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. *The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected.* A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

* * * * *

"The National Labor Relations Act, as amended, gives a bargaining representative not only wide responsibility *but authority to meet that responsibility.*" (at 337-339; italics supplied).

It is clear from the foregoing that the union appellees in the case at bench did not exceed their authority or breach any duty they owed to appellants by accepting, in 1963, the four standards used to determine whether B men would be promoted or deregistered, any more than they exceeded their authority when, in 1959, they entered into an "amendment to the then existing collective bargaining agreement" by virtue of which amendment appellants then obtained their "B" registration. (Br. App. 2)

In *International Longshoremen's and Warehousemen's Union v. Kunz,* 334 F. 2d 165, where a claim was made that an amendment to a collective bargaining contract deprived certain employees of established seniority status, this court said:

> "The settlement of a labor dispute, *whether accomplished by amendment of the contract* or by resort to an already existing contract provision, may affect rights which *in other fields* are regarded as vested and in a manner which would be deemed *'ex post facto'.*" (at 171; italics supplied).

In *Adams v. Budd Company,* 349 F. 2d 368, employees contended that a collective bargaining contract entered into between the union and an employer, deprived them of seniority rights which they had acquired under "earlier labor contracts" (at 369). In holding that there was no jurisdiction under section 301, the court sustained as "well taken" the union's contention (which is the same as that which appellees make here) that section 301 grants jurisdiction over actions "for breach of a labor contract", and that the claim presented to it was " 'not based on a *violation* of a contract between an employer and a labor organization' but 'solely upon the adverse effect upon plaintiffs of the *negotiation* of such an agreement'." (at 369; italics in original).

The court said:

> "Here the plaintiffs do not seek redress for violation *of* a collective bargaining agreement; what they seek is redress for an alleged violation *by* a labor contract of rights which they assert

were independently, and pre-agreement, vested in them by their 'contract of hire.'

"We are of the opinion that Section 301(a) did not confer jurisdiction upon the District Court to entertain this action and that it should have dismissed it for that reason." (at 370; italics in original).[20a]

Since, on the whole record here, it is clear that the appellants' grievance relates to the amendment of the contract and the application of the amended contract to them, rather than to its claimed breach, it cannot be said that appellants state a cause of action under 301. Rather their claim is that, by modifying the contract and thereafter applying the "new rules" to them, appellees breached a duty arising under sections 7 and 8 of the National Labor Relations Act.

3. The Railway Labor Act Cases Do Not Confer Jurisdiction on the District Court.

Appellants seek to avoid the consequences of their failure to have timely submitted their claims to the National Labor Relations Board by relying upon a line of cases which arose under quite a different

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[20a]Compare *Corvallis Sand & Gravel Co. v. Hoisting and Portable Engineers Local Union No. 701,* .....Or..... (October 12, 1966); 64 LRRM 2082, in which the Oregon Supreme Court, referring to *Adams v. Budd Company, supra,* said:

"To apply § 301(a) L.M.R.A. to suits to rescind labor contracts because of unfair labor practices in their procurement would open to regulation by courts almost the entire field of unfair labor practices. We do not believe this was the intention of Congress. The words of the statute have been given a broad construction, but if any significance is to be given to the words 'for violation of contracts' a suit such as the present one does not come within its embrace." (64 LRRM at 2086)

statute. They argue that their first and second causes of action may stand because they there allege that the unions, by agreeing to the standards insisted upon by the association, breached their "duty of fair representation" and, they say, because of this the district court has jurisdiction under 28 USCA 1337. (Br. 2, 7, 37).[21]

As we have already pointed out, claims that a union has not fairly represented employees within the bargaining unit are clearly within the statutory language of the National Labor Relations Act and are matters over which the National Labor Relations Board has taken and continues to take jurisdiction. The cases urged by appellants to support district court jurisdiction of such claims are clearly not controlling, nor even persuasive, arising as they do under the vastly different statutory scheme created by the Railway Labor Act (45 USCA 151 et seq.).[22]

In *Steele v. Louisville & Nashville R.R. Co.,* 323 U.S. 192, the question presented, in the words of Chief Justice Stone, was

> ". . . whether the Railway Labor Act . . . imposes on a labor organization, acting by authority of the statute as the exclusive bargaining representa-

[21]We have already noted (*supra,* notes 2, 4 and 5) that, despite the great number of different federal statutes to which appellants made reference, it was never suggested in any one of the five complaints they filed herein that 28 USCA 1337 conferred jurisdiction on the district court.

[22]Since employment relationships covered by the Railway Labor Act are expressly excluded from the scope of the National Labor Relations Act (Section 2(a)[2] and [3]; 29 USCA 152a [2] and [3]), railroad employees may not avail themselves of the procedures which were available to appellants under the National Labor Relations Act.

> tive of a craft or class of railway employees, the duty to represent all the employees in the craft without discrimination because of their race, and, if so, whether the courts have jurisdiction to protect the minority of the craft or class from the violation of such obligation." (at 193-194).

The court noted that it had granted certiorari because the question was "one of importance *in the administration of the Railway Labor Act.*" (at 194; italics supplied).

In *Steele,* the union had given the employer notice of its desire "to amend the existing collective bargaining contract in such a manner as ultimately to exclude all Negro firemen from the service" (at 195); an agreement to that end had been reached; and the union and the employer, acting under that agreement, had "disqualified all the Negro firemen and replaced them with . . . white men . . . all junior in seniority to petitioners." (at 196).

Having decided that such conduct violated the bargaining representative's duty fairly to represent all employees (at 202), the court turned to the only question relevant to the case at bench: May such a duty be judicially enforced or is the aggrieved party relegated to the administrative agency for relief? The conclusion, that judicial relief was available, rested on shortcomings which the court found in the Railway Labor Act, but which are not to be found in the National Labor Relations Act.

In considering this question, the court announced

the guiding principle at the outset:

> "Since the right asserted by petitioner 'is . . . claimed under the Constitution' and a 'statute of the United States,' the decision of the Alabama court, adverse to that contention is reviewable here . . . *unless the Railway Labor Act itself has excluded petitioner's claims from judicial consideration.*" (at 204; italics supplied).

What are the features of the Railway Labor Act which compelled the conclusion that that Act itself had not excluded petitioner's claims from judicial consideration and how does the National Labor Relations Act compare with them on this score? Essentially they relate to the unique administrative machinery created by the Railway Labor Act—a machinery quite different from that later established by the National Labor Relations Act.

(a) The Railway Labor Act's adjustment procedure is limited to disputes between unions and employers and makes no reference to disputes between employees and unions. (at 205). On the contrary, the National Labor Relations Act in section 8(b), 29 USCA 158(b), contains ample provisions for the adjudication of employee claims against unions.[22a]

[22a] In *Local Union No. 12, supra,* n. 12a, the court, in referring to *Steele,* said:

> "In that case, the [Supreme] Court reasoned that since the jurisdiction of the Railway Adjustment Board did not encompass disputes between employees and unions, the remedy must necessarily be sought in the courts. Since the National Labor Relations Board has, however, been given jurisdiction over employee-union disputes, the Court's logic in *Steele,* reinforced by the Board's express desire to assume jurisdiction further supports our conclusion that unfair representation cases are properly subject to Board jurisdiction." 368 F. 2d at 21.

(b) The Adjustment Board created by the Railway Labor Act "could not give the entire relief here sought"[23] (at 205) because that Board

> "has consistently declined in more than 400 cases to entertain grievance complaints by individual members of a craft represented by a labor organization. 'The only way that an individual may prevail is by taking his case to the union and causing the union to carry it through to the Board'. Administrative Procedure In Government Agencies, S. Doc. No. 10, 77th Cong. 1st Sess. Pt. 4, p. 7." (at 205).

The National Labor Relations Act, to the contrary, does not require that charges be taken up only by a labor organization. (See section 10(b); 29 USCA 160[b]). Indeed, the Board's Rules and Regulations have, from the very beginning, permitted charges to be filed by "any person".[24]

(c) The Railway Labor Act permitted unions to "prescribe the rules under which the labor members of the Adjustment Board shall be selected" and to "select such members and designate the divisions on which each member shall serve." (at 206). Thus it appeared that at least half of the members of the Adjustment Board were to be selected by the organizations against whom the complaint was to be made. The Adjustment Board was, therefore, not an independent

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[23]A phrase emphasized by appellants (Br. 35).

[24]"*Who may file; withdrawal and dismissal.*—A charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person" (Rules and Regulations, National Labor Relations Board, Series 8 as amended, section 102.9).

governmental agency such as is the National Labor Relations Board, whose members are selected by the President and confirmed by the Senate of the United States (National Labor Relations Act, section 3[a], 29 USCA 153[a]).

(d) The Railway Labor Act provided that an employer and a union could agree to the establishment of a regional board of adjustment for the purpose of hearing disputes which might otherwise be brought before the Adjustment Board.

> "In this way the carrier and the representative against whom the Negro firemen have complained have power to supersede entirely the Adjustment Board's procedure and to create a tribunal of their own selection to interpret and apply the agreements now complained of to which they are the only parties." (at 206).

Obviously no such power resides in either employers or unions subject to the National Labor Relations Act. It was because of this shortcoming in the Railway Labor Act that the court said, in a sentence emphasized by appellants (Br. 36),

> "We cannot say that a hearing, if available, before either of these tribunals would constitute an adequate administrative remedy. Cf. Tumey v. Ohio, 273 U.S. 510" (323 U.S. at 206).

The reference to *Tumey* is revealing. That case held it to be a denial of due process to compel one to proceed before a tribunal which had a financial stake in its own decision. The tribunals set up by the Railway Labor Act were, for the reasons already noted, so regarded by the court. No one can suggest that this is

true of the National Labor Relations Board—a tribunal which is truly independent of the litigants and which has no stake in the outcome of any of the cases presented to it.

In view of all of these shortcomings in the Railway Labor Act, it is not surprising that the court said:

> "*In the absence of any available administrative remedy,* the right here asserted, to a remedy for breach of the statutory duty of the bargaining representative to represent and act for all the members of a craft, *is of judicial cognizance* . . . [T]he statutory provisions which are in issue are stated in the form of commands. For the present command *there is no mode of enforcement other than resort to the courts* . . . [*since*] *it is one for which there is no other available administrative remedy.*" (at 207; italics supplied)

Obviously, if there had been an independent agency such as the National Labor Relations Board to which the complainants themselves could have presented their claims and by which those claims could have been processed against the unions, and if the statute had provided that the determinations of the agency were enforcible in the courts of appeals (section 10(e) of the National Labor Relations Act, 29 USCA 160[e]),[25] the Supreme Court in *Steele* would hardly have concluded that, under the Railway Labor Act, there was

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[25]Indeed, the National Labor Relations Act in Sections 10(l) and (m) contains provisions for the granting of *pendente lite* injunctive relief, *at the suit of the Board,* in appropriate cases—including cases involving, as this one does, a charge of unfair practices against a union (29 USCA 160[l] and [m]).

"no mode of enforcement other than resort to the courts" and it would not therefore have created the judicial remedy which it did. It is patent from the entire opinion that the court acted as it did because of the absence of an effective and meaningful administrative remedy *under the Railway Labor Act.* That is not the case with respect to the National Labor Relations Act.[26]

This court has recognized that, for these very reasons, the Railway Labor Act cases are not governing in situations to which the National Labor Relations Act is applicable.

> "Since the complaint charges both the union and the employer with discrimination against appellants solely on the basis of their nonunion status, §§8(a)(3), 8(b)(2) of the National Labor Relations Act would arguably apply to the conduct to which appellants object. Accordingly, the district court ruled, under San Diego Building Trades

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[26]Most recently, in *Republic Steel Corporation v. Maddox,* 379 U.S. 650, the court recognized the difference between suits under section 301 and those under the Railway Labor Act, with its "various distinctive features of the administrative remedies provided by that Act . . . e.g. the makeup of the Adjustment Boards . . ." (at 657, n. 14).

On December 5, 1966, after this brief was already in page proof, the Supreme Court once again emphasized that the vast differences in the administrative remedies available under the Labor Management Relations Act, on the one hand, and the Railway Labor Act, on the other, call for different treatment of an employee's suit for breach of contract. *Walker v. Southern Railway Company,* ..... U.S. ....., 17 L ed 2d 294; 35 U.S. L. WEEK 4047; 63 LRRM 2491. ("The contrast between the administrative remedy before us in *Maddox* [a case arising under section 301] and that available to petitioner [under the Railway Labor Act] persuade[s] us that we should not [require him to exhaust his administrative remedies before his resort to the courts]." 17 L ed 2d at 297; 35 U.S. L. WEEK at 4048; 63 LRRM at 2492).

Council v. Garmon (1959), 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed. 2d 775, that initial jurisdiction lay exclusively with the National Labor Relations Board.

"Appellants assert that this constituted error. They rely upon a line of cases which recognizes federal court jurisdiction to enforce the duty of fair representation owed by the unions to those they represent. *Those cases, however, do not support appellants' contention. In none of them was there available any administrative remedy which would serve to deprive the federal courts of jurisdiction. Therefore the doctrine of primary jurisdiction of the National Labor Relations Board never was brought into play.*

"MANY OF THE CASES CITED AROSE UNDER THE RAILWAY LABOR ACT, *which makes no provision for administrative means for correcting breaches of the duty of fair representation . . .*

"While resort to the federal courts was proper under those circumstances, *it would be improper here in the face of the competence of the National Labor Relations Board to handle the alleged discrimination.*" (*Alexander v. Pacific Maritime Association,* 314 F. 2d 690, 691-692; italics and capitalization supplied).

All of the other Railway Labor Act cases cited by appellants (Br. 37-42) emphasize the absence of an administrative remedy *under the provisions of that statute. Tunstall v. Brotherhood of Locomotive Firemen,* 323 U.S. 210, 213; *Brotherhood of Railroad Trainmen v. Howard,* 343 U.S. 768, 774; *Conley v. Gibson,* 355 U.S. 41, 44-45.

Indeed, these cases make it clear that if there had been an administrative remedy (as there is in the case at bench), resort to the courts would have been barred.

> "For the reasons also stated in our opinion in the *Steele* case, the petitioner is without available administrative remedies, *resort to which, when available, is a prerequisite to equitable relief in the federal courts.*" (*Tunstall v. Brotherhood of Locomotive Firemen,* 323 U.S. at 213-4; italics supplied)

On the same day on which it decided *Steele* and *Tunstall,* the Supreme Court also decided *Wallace Corporation v. National Labor Relations Board,* 323 U.S. 248, in which, to quote appellants, "the concepts of unfair representation were applied to the National Labor Relations Act." (Br. 38).

Wallace's real significance for the case at bench, however, is that there the court did not feel the need, as it did in the Railway Labor Act cases, to create a judicial remedy to enforce the substantive right. It accepted the fact that Congress had, in the National Labor Relations Act, provided an administrative procedure to remedy the complained-of conduct. In *Wallace,* the parties had used that procedure and the Board had made an appropriate remedial order. What the Supreme Court did in that case was to affirm a judgment of the court of appeals enforcing that order.

Thus, *Wallace* itself demonstrates that the duty of fair representation is perfectly capable of enforce-

ment by the National Labor Relations Board[26a] and that there is no need, in any case within the competence of that Board, to create a judicial remedy to enforce that duty.

Certainly nothing in the legislative history of section 301 indicates that Congress intended any change in the law in this respect. Indeed, the evidence is impressive that the chief purpose of that section was to remove certain procedural obstacles which in 1947 were thought to stand in the way of suits against labor organizations. Thus, Senator Taft, the chief architect of the 1947 labor law revision of which section 301 was an integral part, said of this portion of the bill:

> "Mr. President, title III of the bill . . . makes unions suable in the Federal courts for violation of contract. As a matter of law unions, of course, are liable in theory on their contracts today, but as a practical matter it is difficult to sue them. They are not incorporated; they have many members; in some States all the members must be served; it is difficult to know who is to be served. But the pending bill provides they can be sued as if they were corporations and if a judgment is found against the labor organization, even though it is an unincorporated association, the liability is on the labor union and the labor-union funds, and it is not on the individual members of the union, where it has fallen in some famous cases to the great financial distress of the individual members of labor unions." 93 Cong. Rec. 3955.

[26a] *Wallace's* promise was realized in the Labor Board cases cited at page 15, *supra,* and in *Local Union No. 12, supra,* n. 12a.

While *Syres v. Oil Workers International Union,* 350 U.S. 892, presented a situation in which the post-1947 National Labor Relations Act, rather than the Railway Labor Act, was involved, it is necessary to examine the case closely in order to understand its *per curiam.*

According to the court of appeals (*Syres v. Oil Workers International Union,* 223 F. 2d 739), the complaint was brought by a Negro local and individual Negroes against a white local and the employer. It charged that, *pursuant to an agreement between the two locals* and after an election, both locals were certified as the joint bargaining representative. It further charged that thereafter the employer and the white local entered into a contract, the effect of which was "to freeze the Negro employees in their jobs and prevent their bidding on higher classifications" and that "this discrimination was based solely on race." (223 F. 2d at 740).

The district court's dismissal of the complaint upon the ground that the action did not arise under laws of the United States was affirmed by the court of appeals. Although the exclusiveness of the Board's jurisdiction was urged for dismissal (223 F. 2d at 740), the majority in the court of appeals did not discuss this question or the applicability, if any, of section 301 to the case. While the dissent of Judge Rives does not discuss section 301, it does make clear why it was appropriate, *in 1955,* to conclude that judicial relief was available to the plaintiffs *in that case.*

Judge Rives noted that the complaint was one of deprivation of employment rights "solely on account of race and/or color" (223 F. 2d at 745) and pointed out that

> "Nowhere is the Board given power to prevent discrimination because of race or color, except by very limited procedure which would afford no adequate remedy in this case." (223 F. 2d at 747)[27]

(This, of course, is not true of the case at bench. The complaint here charges discrimination against appellants, not on racial grounds, but because of their alleged opposition to the union leadership and to the unions' entry into a mechanization contract against which one appellant claims to have spoken out.[28] A claim of such discrimination is clearly cognizable under the National Labor Relations Act and in fact, as we have seen, the National Labor Relations Board has taken jurisdiction and made appropriate orders in cases presenting such claims.)

Judge Rives further pointed out that the Board decisions, as of the time he wrote, did not afford an adequate administrative remedy for cases in which racial discrimination (as contrasted with the type of

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[27]In *Alexander v. Pacific Maritime Association*, 314 F.2d 690, this court, referring to *Syres*, recognized that the acts of racial discrimination there charged were not, as here, "anti-union in character" and therefore "were not, even arguably, unfair labor practices under the National Labor Relations Act." (at 692). See *Chasis v. Progress Manufacturing Company, Inc.*, 256 F. Supp. 747, 751, n. 6.

[28]". . . because of his leadership of the B men and his open criticism of the policies of the P.M.A. and I.L.W.U. . . ." Br. 90.

discrimination charged here) was involved.

> "It is suggested that appellants could petition the Board for (1) a separate bargaining unit of their own, or (2) decertification of their bargaining representative. There is, however, no administrative means by which the [N]egro members can secure adequate separate representation for the purposes of collective bargaining.[9] Decertification by the Board would afford no remedy at all. The alleged discriminatory contract would remain in full force after any such decertification. Further, there is no assurance that the majority of the employees in the unit, who are white persons, would select another representative who would bargain without discrimination." (223 F. 2d at 747).

"[9]See Steele v. Louisville & N. R. Co., supra. See also, Crescent Bed Co., 29 NLRB 34; Columbian Iron Works, 52 NLRB 370; Larus & Bros. Co., 54 NLRB 1345; American Tobacco Co., 9 NLRB 579; and Georgia Power Co., 32 NLRB 692." (Judge Rives' footnote).

The Board cases cited by Judge Rives reveal that in the early years of its existence the Board did indeed take the view that racial discrimination was not, under section 8 of the National Labor Relations Act, an unfair labor practice which could be remedied by the procedures provided for in section 10. The most that the Board did in such cases, as Judge Rives pointed out, was to afford some limited relief in connection with its duties under section 9 of the Act (29 USCA 159) dealing with representation matters.[29]

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[29]It was not until 1964 that the Board for the first time held that a union commits an unfair labor practice when it causes or permits discrimination against employees because of their race or

It is not surprising, therefore, that, on the facts of *Syres* and the state of the Board's decisional law at that time, Judge Rives concluded that there was no adequate administrative remedy for the Negro employees.

The *per curiam* by the Supreme Court is thus completely understandable. It means only that the court agreed with Judge Rives that there was in 1955 no adequate administrative remedy which the National Labor Relations Board could have made available to correct racial discrimination.[30] It does not mean, as appellants urge, that there was no administrative remedy available in 1965 to handle their complaints of alleged discrimination of quite a different nature.[30a]

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color. *Independent Metal Workers Union, Local No. 1,* 147 NLRB 1573. Since that time the Board has consistently adhered to this position and given relief against such discrimination. *Local 1367, International Longshoremen's Association,* 148 NLRB 897; *Local Union No. 12, United Rubber, etc. Workers,* 150 NLRB 312, enforced in *Local Union No. 12 v. National Labor Relations Board, supra,* n. 12a.

[30]In view of the Board's present position (*supra,* n. 29) that racial discrimination constitutes an unfair labor practice for which it can and does give a remedy, it may be questioned whether *Syres* would today be decided as it was in 1955.

[30a]In *Local Union No. 12, supra,* n. 12a, the court (which included Judge Rives) said of *Syres:*

> "Significantly . . . . that case *clearly involved a breach of the bargaining contract. . . .*" (368 F. 2d at 21, n. 17; italics supplied).

This, of course, makes *Syres* out to be a true 301 case and not a case, as appellants would have it, involving only the breach of the duty of fair representation.

In addition, the court, in *Local Union No. 12,* said:

> "Although *Syres v. Oil Workers Union, supra, clearly involved a violation of the bargaining contract* in addition to a breach of the duty of fair representation, that decision might be interpreted as establishing the principle that the courts should retain jurisdiction over unfair representation cases

B. THE FAILURE OF APPELLANTS TO EXHAUST THE REMEDIES AVAILABLE TO THEM UNDER THE COLLECTIVE BARGAINING CONTRACT REQUIRES AN AFFIRMANCE OF THE ORDER BELOW.

The collective bargaining contract upon which this suit purports to be based contains grievance-arbitration procedures for the resolution of conflicts such as are here presented.[31] Appellants commenced, but did not conclude, such procedures under the contract. For this reason, *inter alia,* Chief Judge Harris was correct in ordering a dismissal of their complaint.

Appellants now contend that, although the contract by its very words provides an internal remedy in cases of "discrimination . . . because of membership or non-membership in the Union, activity for or

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even where no breach of the bargaining contract is involved. *Syres* arose, however, prior to the Supreme Court's comprehensive extension of the pre-emption doctrine in *Garmon,* and well before the Board began to express its intention to assert jurisdiction over unfair representation cases. Thus, *at the time of Syres,* the employee's sole remedy for a breach of the duty of fair representation lay in the courts." (368 F. 2d at 22, n. 20; italics supplied).

It is to be noted that 301 covers suits for violations of contracts "between . . . labor organizations" as well as between "an employer and a labor organization." (29 USCA 185[a]). See page 50, *supra.*

It is also to be noted that in its latest pronouncement on the subject, the Supreme Court said:

". . . courts have no jurisdiction to enforce the union's statutory rights under §§ 8(a) (5) and (1)." (*National Labor Relations Board v. C & C Plywood Corp., supra,* n. 16a; 35 U.S. L. WEEK at 4107, n. 13; 64 LRRM at 2067, n. 13.)

By a parity of reasoning, courts have no jurisdiction to enforce (save through the National Labor Relations Board's administrative order route) an individual's claim of breach of "the duty of fair representation".

[31]This is true of the contract both before and after the "new rules" *supra,* pages 5 and 6, relating to B men were adopted.

against the Union or absence thereof . . ." (Exhibit A to the Affidavit of B. H. Goodenough [Section 13]; R. 4), their claims do not fall within the "ambit" of the contract (Br. 70-72).

But appellants cannot have it both ways. Either their claims are claims of "discrimination . . . because of . . . activity . . . against the Union . . ." and therefore are within section 13 of the contract, or they are not, and, therefore, they are not claims of "discrimination" within the scope of *Humphrey v. Moore,* 375 U.S. 335. The parties to the collective bargaining contract provided, as they had the right and perhaps the duty to provide, an internal remedy by way of arbitration for such claims.

Federal labor policy (applicable to suits under section 301 [*Textile Workers v. Lincoln Mills,* 353 U.S. 448, 457; *Local 174, Teamsters Union v. Lucas Flour Co.,* 369 U.S. 95, 103]) requires that such contract remedy be exhausted before there may be resort to the courts. Congress has expressly stated this policy in section 203(d) of the Labor Management Relations Act of 1947 (29 USCA 173[d]),[32] and the federal courts have consistently encouraged the use of arbitration machinery in labor cases. The so-called "Steel Workers Trilogy" *(United Steelworkers v. American Manufacturing Co.,* 363 U.S. 564; *United Steelworkers*

[32]This section reads, in pertinent part:
"Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the *application or interpretation* of an existing collective-bargaining agreement" (italics supplied).

v. Warrior and Gulf Navigation Co., 363 U.S. 574; and *United Steelworkers v. Enterprise Wheel and Car Corp.,* 363 U.S. 593) establishes the preferred place of arbitration in our national labor scheme and makes it clear that in all cases "[d]oubts should be resolved in favor of coverage". *United Steelworkers v. Warrior and Gulf Navigation Co.,* 363 U.S. at 583. See also *Drake Bakeries v. Local* 50, 370 U.S. 241; *Carey v. Westinghouse Electric Corp.,* 375 U.S. 261.

In *Republic Steel Corporation v. Maddox,* 379 U.S. 650, an action for wages was ordered dismissed for failure to exhaust the arbitration machinery of the applicable collective bargaining contract. The Supreme Court held that the suit, under section 301, was governed by the federal law requiring exhaustion of such remedies.

> "A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements'." (379 U.S. at 653).[32a]

[32a] In *Walker v. Southern Railway Co.,* decided on December 5, 1966, *supra,* n. 26, the Supreme Court said that in *Maddox:*

> "We held that contract grievance procedures voluntarily incorporated by the parties in collective bargaining agreements

This court has held that arbitration procedures must be exhausted before resort can be had to the courts. (*Local Union No. 11 v. Thompson,* 363 F. 2d 181.)[33]

The argument that an employee should not be compelled to exhaust the contract grievance machinery when he claims the union is hostile to him (Br. 82-86) is not relevant here, for it is grounded on the view that the employee himself would not be permitted to present his case to the arbitrator. "It would entrust representation of the employee to the very union which he claims refused him fair representation . . ." (*Hiller v. Liquor Salesmen's Union,* 338 F. 2d 778, 779).[34] Whatever may have been the terms of the contract in *Hiller,* the contract between ILWU and PMA provides that whenever an employee (registered or casual) claims "discrimination," *he* may "have the complaint adjudicated hereunder . . ." (Exhibits A [Section 17.4] and B [Section 2] to the affidavit of B. H. Goodenough; R. 446). It further

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subject to the LMRA, unless specified by the parties to be nonexclusive, must be exhausted before direct legal redress may be sought by the employee." 17 L ed 2d at 296-297; 35 U.S. L. WEEK at 4048; 63 LRRM at 2492.

[33]Other courts of appeals have also required exhaustion of contract remedies in these cases. *Woody v. Sterling Aluminum Products, Inc.,* 365 F. 2d 448; *Broniman v. Great Atlantic & Pacific Tea Co.,* 353 F. 2d 559; *Rhine v. Union Carbide Corp.,* 343 F. 2d 13; *Belk v. Allied Aviation Service Co.,* 315 F. 2d 513, *cert. den.,* 375 U.S. 847.

[34]See the treatment of *Hiller* in *Woody v. Sterling Aluminum Products, Inc.,* 243 F. Supp. 755 ("The arbitration procedure would be under the control of the very party which the employee 'claims refused him fair representation . . .'" [at 768]), affirmed *Woody v. Sterling Aluminum Products, Inc.,* 365 F. 2d 456.

provides that such remedy shall be "exclusive." (ibid.). Appellants were advised that *they* could take the matter, either in person or by counsel, to arbitration before Professor Kagel. (R. 3, 84-85). They did not then make the challenges which their counsel now make; they simply ignored the last step of the grievance procedure although they knew it was available to them. They thereby failed to exhaust their contract remedies and Chief Judge Harris was therefore correct in ruling, as an independent ground of decision, that they had no standing to bring suit under section 301.

C. UNDER FEDERAL LABOR LAW, OFFICERS OF A LABOR ORGANIZATION ARE NOT LIABLE FOR DAMAGES IN A SUIT UNDER SECTION 301.

Under federal law, which governs suits brought under section 301 *(Textile Workers v. Lincoln Mills,* 353 U.S. 448, 457; *Local 174, Teamsters Union v. Lucas Flour Co.,* 369 U.S. 95, 103), it is clear that no cause of action is created against individual union officers.

Atkinson v. Sinclair Refining Co., 370 U.S. 238:

> "When Congress passed section 301, it declared its view that only the union was to be made responsible for union wrongs . . .
>
> "The national labor policy requires and we hold that when a union is liable for damages . . . , its officers . . . are not liable for those damages." (at 247-249).[35]

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[35]This view was followed in *Gilmour v. Wood etc. Union,* 223 F. Supp. 236.

The cases cited by appellants are not to the contrary. In *Wanzer v. Milk Drivers Union,* 249 F.Supp. 664, the court stated:

> "[Plaintiff] does *not* seek *damages* against the individual defendants" (at 667; italics supplied).

United Mine Workers v. Gibbs, 383 U.S. 715, and *Price v. United Mine Workers,* 336 F.2d 771, were not suits under section 301. To the contrary, they involved the rights of the states to deal with acts of violence which the court had long since recognized were not preempted by federal labor law. *(United Mine Workers v. Gibbs,* 383 U.S. at 721).

The doctrine of pendent jurisdiction does not apply here. For, whatever may be the law of California on the tort question, the claim here is sought to be stated under section 301 and it would defeat the national labor policy to permit a state (even if this action were in a state court) to impose liability upon individuals when such liability may not be imposed upon them under the federal law.

As stated in *Local 24 etc. v. Oliver,* 358 U.S. 283:

> "We must decide whether Ohio's anti-trust law may be applied to prevent the contracting parties from carrying out their agreement upon a subject matter as to which federal law directs them to bargain. Little extended discussion is necessary to show that Ohio law cannot be so applied . . . To allow the application of the Ohio anti-trust law here would wholly defeat the full realization of the congressional purpose" (at 295-296).

See also, *Pennsylvania R.R. Co. v. Day,* 360 U.S. 548.

Thus, even if it be true that in certain tort situations California would award damages against the individual appellees, that may not be done in an action governed by contrary federal law.

The problem here is no different from that in *Dice v. Akron, etc. RR. Co.,* 342 U.S. 359, where, in speaking of another federal statute, the court said:

> "Moreover, only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes." (at 361).

Were it argued that the complaint seeks to state two distinct claims, one against the unions and the employers under section 301 and the other against the individuals in tort, the doctrine of pendent jurisdiction still would have no application.

> "The fact that state remedies were not entirely pre-empted does not, however, answer the question whether the state claim was properly heard in the District Court absent diversity jurisdiction. The Court held in Hurn v. Oursler, 289 US 238, that state law claims are appropriate for federal court determination if they form a separate but parallel ground for relief also sought in a substantial claim based on federal law. The Court distinguished permissible from nonpermissible exercises of federal judicial power over state law claims by contrasting 'a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly

> wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal *ground;* in the latter, it may not do so upon the non-federal *cause of action.*' 289 US, at 246." (*United Mine Workers v. Gibbs,* 383 U.S. at 722; italics in original).

Here there is either one single cause of action, in which case it is clear that the national labor policy expressed in *Atkinson, supra,* is controlling; or there are two separate causes of action, in which case *Hurn v. Oursler,* 289 U.S. 238, by its own terms, does not apply. (See *Woody v. Sterling Aluminum Products, Inc.,* 365 F. 2d 448, 456.) For, where the federal policy is clearly established, state law to the contrary cannot be imported into the case under the guise of "pendent jurisdiction". *Local 20, Teamsters Union v. Morton,* 377 U.S. 252, 257-261; *cf. Dice v. Akron etc. RR. Co.,* 342 U.S. 359, 361.

V.

CONCLUSION

The record in this case demonstrates that appellants were not entitled to any relief at the hands of the district court and that, therefore, its order of dismissal was correct. This is not in truth and in fact an action for breach of a collective bargaining contract. The joint employer-union committee deregistered appellants because they were "chiselers, dues delinquents, and contract violators". (Br. App. 10).

Under the contract, appellants had the right to appeal this determination and to press, up to and through arbitration, any contention that it violated their contractual rights. They commenced, but failed to exhaust, this available contract machinery. They also had the right to press any claim of breach of the duty of fair representation before the National Labor Relations Board but, for ulterior reasons, they deliberately refrained from doing so until it was too late. The claims of others similarly situated were, on the merits, found by the Board to have been groundless.

The main question presented by this case—the authority of the parties to a collective bargaining contract to modify and administer it as against claims by individuals that such action resulted in a breach of the duty of fair representation—goes to the very heart of the collective bargaining process. The fundamental issue before this court is whether such a question is to be decided, in the first instance at least, by the specialized agency created by Congress to deal with it (subject to appropriate review of that agency's action in the courts of appeals) or whether, under the guise that it entails a breach of contract claim, such a question is to be relegated to tribunals—state or federal—which were never intended to, and are not particularly equipped to, handle it.

The Court of Appeals for the Fifth Circuit in *Local Union No. 12,* n. 12a *supra,* put it this way:

> "In light of these considerations, *we are convinced that the rights of individual employees to be fairly represented* can be more fully achieved

within the spirit of the act BY RECOGNIZING THE BOARD AS THE APPROPRIATE BODY TO MEET THE CHALLENGE OF UNIFORMLY ADMINISTERING STANDARDS OF FAIR REPRESENTATION. Its peculiar expertise with respect to the complexities of the bargaining process, its broad powers of investigation, and most importantly, its power to encourage informal settlements at the regional director level *render it better qualified than the necessarily diverse system of state and federal tribunals to meet the task of formulating and applying uniform standards of fair representation in such manner as to afford adequate protection to employee rights* WITHOUT UNDULY IMPEDING THE COLLECTIVE BARGAINING PROCESS. We have confidence in the competence of the Board to discharge this delicate task of striking a meaningful balance between its primary duty of promoting union-management relations and that of safeguarding the section 7 rights of employees, *a task which will entail nothing new to the agency initially designated as the appropriate body to construe and apply the unfair labor practice provisions of the act as well as its representation provisions.*" (368 F. 2d at 23-24; italics and capitalization supplied).

For the foregoing reasons,[36] the judgment of the district court should be affirmed.

Dated, San Francisco, California,
January 30, 1967.

GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,
By NORMAN LEONARD,
Attorneys for Appellees Above-named.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

NORMAN LEONARD,
Attorney for Appellees Above-named.

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[36]The other grounds relied upon by the district court in support of its order are equally valid. The Norris-LaGuardia Act (29 USCA 101) deprives the district court of jurisdiction to grant injunctive relief (*Sinclair Refining Co. v. Atkinson,* 370 U.S. 195; see also *National Labor Relations Board v. C & C Plywood Corp.,* n. 16a, *supra;* 35 U.S. L. WEEK at 4108, n. 15; 64 LRRM at 2068, n. 15), and exemplary or punitive damages are not awardable in a case such as this (cf. *United Mine Workers v. Patton,* 211 F. 2d 742).

No. 20719

In the

United States Court of Appeals

For the Ninth Circuit

GEORGE R. WILLIAMS, et al.,

Appellants,

vs.

PACIFIC MARITIME ASSOCIATION, a non-profit corporation, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, an incorporated association, et al.,

Appellees.

Brief of Appellee Pacific Maritime Association

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Appellees.

Brief of Appellee Pacific Maritime Association

This brief is filed on behalf of appellee Pacific Maritime Association (PMA). The other appellees - including the International Longshoremen's and Warehousemen's Union (ILWU), International Longshoremen's and Warehousemen's Union, Local 10 (Local 10), and individual defendants holding official positions with ILWU and Local 10 - are submitting a separate brief.

STATEMENT AS TO JURISDICTION

Appellants assert that the federal courts have jurisdiction over their claim on the basis of § 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185. The district court's jurisdiction under § 301 is precisely restricted to "suits for violation of contracts between an employer and a labor organization . . . or between any such labor organizations".[1]

Appellee asserts that federal jurisdiction does not exist because there are no facts that would support a finding of federal jurisdiction on trial of this case. In taking this position, we are not at issue with respect to any question of the sufficiency of pleadings, either to raise a federal jurisdiction claim or to withstand a simple motion to dismiss the pleadings. This case has moved beyond these preliminary issues. We shall direct our discussion to facts that led to the order for summary judgment, which was based on the pleadings and exhaustive affidavits.

Appellants have filed five successive complaints in the district court, each alleging § 301 jurisdiction. The district court, with great patience, permitted appellants five opportunities to frame and reframe their complaint. Repeatedly they were also permitted to redraft their allegations so as to present, by affidavit, their version of all of the factual matters thought by them to have a bearing on their complaint. The court finally dismissed their fourth amended

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1. Section 301(a), 29 U.S.C. § 185(a) reads:
"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

complaint without leave to amend.[2] It is manifest from the allegations of the complaint and from the evidentiary matter submitted to the trial court by affidavit that, even on the facts as appellants claim them to be, they cannot frame a complaint stating a violation of a collective bargaining contract and cannot establish such a claim at a trial. On this ground we submit that the district court has no jurisdiction to hear the matters of which appellants complain.

On this appeal, appellants have added a new claim of federal jurisdiction based on 28 U.S.C. § 1337, giving the district courts jurisdiction of "... any civil action ... under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies". The act "regulating commerce" in this matter could only be the Labor Management Relations Act of 1947 (29 U.S.C. § 141, et seq., including § 185). That statute, by its very wording and by court interpretation, bars district court jurisdiction of the case unless there is federal jurisdiction under § 301 (29 U.S.C. § 185). The allegation of independent federal court jurisdiction under 28 U.S.C. § 1337 is totally without merit.

This Court has jurisdiction to hear the appeal under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

This appeal is from the order of the District Court for the Northern District of California, dismissing the fourth amended complaint of appellants and granting summary judgment in favor of appellees.

The motions to dismiss the fourth amended complaint were based on the pleadings and affidavits submitted by appellee PMA and an affidavit submitted by one appellant.

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2. Hereafter we shall frequently refer to the fourth amended complaint simply as "the complaint" without further description.

The "Statement of the Case" submitted by appellants ignored the undisputed facts set forth in the affidavits submitted by appellee PMA in support of its motion to dismiss. These are:

1. The affidavit of B. H. Goodenough, Vice President of Pacific Maritime Association, filed September 1, 1964, and its attached exhibits A, B, C, D and E. (R. 1-6).
2. The affidavit of J. A. Robertson, Secretary of Pacific Maritime Association, filed October 2, 1964, and its attached exhibits F and G (R. 749-767).
3. The affidavit of J. A. Robertson, filed March 18, 1965, and its attached exhibits H and I. (R. 82-91aa).
4. The affidavit of J. A. Robertson, filed July 2, 1965, and its attached exhibits J, K and M. (R. 176-180d).

PMA believes that appellants have not presented a proper statement of the case in their brief. Accordingly, we state the case here, basing our discussion on facts as to which there is no controversy.

A. The parties were all directly involved in the employment of longshoremen in San Francisco.

This case involves, on the one hand, a group of men who were formerly employed as longshoremen in San Francisco and, on the other, their employers and their union.

Appellants, plaintiffs below, formerly worked as longshoremen and seek to litigate their discharges.

Appellants at one time were limited registration (Class B) longshoremen on the San Francisco waterfront. Prior to starting this case, each appellant applied to advance from this probationary seniority status to full (Class A) registration status. His application was denied, his registration status was terminated, and he was discharged ("deregistered") because he failed to meet the established standards to advance in seniority status as a longshoreman.

Appellees, defendants below, are the employers, the union and certain union officials.

Appellee Pacific Maritime Association (PMA) is the collective bargaining representative of employers of longshoremen in the San Francisco Bay Area and elsewhere on the Pacific Coast (R. 1). Appellee International Longshoremen's and Warehousemen's Union (ILWU) is the exclusive collective bargaining representative of the longshoremen (R. 1, 109, 110). Appellee Local 10 is a chartered local union affiliate of the ILWU limiting its membership and activities to the San Francisco area (R. 110). The individually named appellees are described in the complaint as "officers or executive officials of the defendant labor organizations" (R. 120, ¶ 52). None is an officer, employe, or agent of PMA.

B. The appeal before this Court involves the terms of the ILWU-PMA collective bargaining contract and its administration.

Appellants claim they should be returned to employment as registered longshoremen under the ILWU-PMA collective bargaining contract, and with greater seniority than they had prior to their discharges in 1963. Appellants attack provisions of the contract, as it was in effect in 1963, and its administration. The history of collective bargaining on the San Francisco waterfront is of major significance to understanding the problems presented here.

1. The nature of longshore employment is unique.

The ILWU-PMA collective bargaining contract reflects the unique nature of longshore employment. Because of this, it is notably different in several respects from union-employer contracts in other trades. It is not characteristic of the longshoreman's job that he reports to a regular work place or even to a number of places designated by a single employer. Rather, he reports to a dispatching hall and from there is dispatched to work assignments for any one of the

many employers who are represented by PMA for collective bargaining purposes. This dispatching hall serves as the means of communication between the many employers and the many longshoremen; through it each longshoreman is told for whom he will work that day, at which of the many ships and docks he will work, and his time to report. Through the same dispatching process, each employer gets the men it needs for each of its many operations, at the time and place that they are needed.

2. Essentials of basic structure and underlying principles of the ILWU-PMA contract are refinements of the 1934 federal arbitration award.

(a) Since 1934 the ILWU-PMA contract has provided a system of registration to accomplish decasualization of longshore labor on the Pacific Coast. In 1934, the entire Pacific Coast experienced a longshoremen's strike that caused staggering injury to the maritime industry - employers and employes alike - and to the public. Because of the impact on the national economy and welfare, President Roosevelt appointed the National Longshoremen's Board as arbitrators to settle the dispute. The Board concluded that the casual nature of the longshoreman's job, resulting from the lack of control over the entry of workers into the longshore labor force and over their continuing status, was a significant cause of the 1934 strike. Accordingly, the Board ordered a program of decasualization among Pacific Coast longshore employes and the inauguration of a system of "registration" to provide such decasualization (R. 750).

While the system of registration has been refined over the years, its essence remains today as it was established by the 1934 award. The size of the registered list for each port has been controlled to be in balance with long-term expectations as to the hours of work to be assigned to these men. Each man on the list has a regular, not a casual employment, job. As a result, West Coast longshoremen have achieved steady

employment, high and regular earnings, permanent security in these regards until retirement, and protection against discharge after full (Class A) registration has been achieved (R. 751-752).

(b) Since 1934 the ILWU-PMA contract has provided a seniority system with seniority preference in the dispatching of longshoremen to their work. Since 1934 all longshoremen have been dispatched to their daily work through halls operated jointly by the union and the employers (R. 4, page 42). To effectuate the decasualization of the jobs of the registered longshoremen, the award provided that only men on the registered list could be dispatched to longshore work while any man on the list was able and available to perform the work (R. 4, page 43). This was the initial recognition of seniority preference through the registration system. It is the essence of the decasualization process.

Three basic seniority classifications are now used in the administration of the ILWU-PMA contract. The core of longshore labor consists of the fully registered (Class A) longshoremen. To supplement this work force, a system of probationary (Class B) limited registration was developed (R. 751). Provisions were made for advancing men from the probationary group to full (Class A) registration from time to time as needed. A third category of "casual employes" also exists; it includes the longshoremen on neither registered list. In view of the three basic seniority classifications, a Class B longshoreman will not be dispatched so long as a fully registered (Class A) longshoreman is able to perform the work and is available for dispatch (R. 4, page 45). Similarly, no casual longshoreman will be dispatched so long as a Class B man is able to perform the work and is available for dispatch (R. 4, pages 43, 45). These three basic seniority classifications have led to three

corresponding gradations in the other consequences of seniority, including steadiness of employment, amount and regularity of earnings, security against lay-off, likelihood of discharge, selection of work classifications, promotion, guarantees and vacations, welfare, pensions, and other fringe benefits.

(c) The 1934 award, and the succeeding ILWU-PMA contracts, have also provided for a system of joint labor relations committees. Joint committees were established on the principle of equal voting power between the union, on the one hand, and the employers, on the other hand (R. 4, pages 63-64). They were given the duty and power of controlling the registration lists. They also were given the authority to handle grievances arising in the course of living under the collective bargaining contract, whether presented by individual employes, the union or the employers. The joint committees thus have a direct and active role in the administration of the collective bargaining contract, particularly in the recruitment and selection of employes and in advancing them in seniority status. This type of joint participation in initiating contract administration action, which may be unique in American industry, is a natural outgrowth of the vision of the National Longshoremen's Board in 1934 in establishing the foundations of a form of industrial self-government geared to this unique industry and tailored to meet realistically its day to day problems.

At the present time there are three levels of committees; the lowest are at the port level ("Joint Port Committee"), the next at the area level ("Joint Area Committee"), and the highest at the coast level ("Joint Coast Committee"). Since 1934 there have been provisions for resolution of disputes through arbitration where the joint committees cannot resolve a dispute. The arbitrators now have permanent, not *ad hoc,* appointments. (R. 4, page 71).

3. The relevant terms of the contract in effect in 1963 are found in a number of documents of the ILWU-PMA contract.

The basic document of the collective bargaining contract between PMA and ILWU is entitled "Pacific Coast Longshore Agreement (1961-1966)" (R. 4). This basic document, continues in effect the essentials of the 1934 award, referred to above, and other basic principles there set forth. Many are not common-place in collective bargaining; others are typical products of nature collective bargaining relationships.

The overall agreement provides a system of self-government for waterfront labor relations. It includes terms on such subjects as wages and hours, registration and deregistration, dispatching practices, seniority preferences, discipline of employes, joint labor relations committees, contract administration and grievance-arbitration procedures, nondiscrimination, promotions, holidays and vacations, work methods, mechanization and modernization, welfare, pension, and other fringe benefits, etc. The basic document is supplemented by local rules and agreements, as well as supplemental documents of coastwide application, filling in the interstices in the basic document's fundamental law of waterfront labor relations. It is explained and interpreted in a history of joint actions and arbitrators' awards. The contract also includes many other products of the day-to day conduct of labor relations that amplify, implement, supplement, effectuate, interpret and apply the provisions set forth in the basic document.

(a) The ILWU-PMA contract binds appellants and appellees. The contract binds not only Pacific Maritime Association as an entity, but also the employers comprising the Association. It also binds the ILWU and its longshore locals. It also binds the individuals represented by the

ILWU, all the longshoremen in the collective bargaining unit (R. 4, page 1). This is as required by § 9 of the National Labor Relations Act (29 U.S.C. § 159).

(b) The contract gives the joint committees control as to who should be on the registered list. Section 8.31 of the contract (R. 4, page 44) provides that the Joint Port Labor Relations Committees, "subject to the ultimate control of the Joint Coast Labor Relations Committee, shall exercise control over the lists in that port including the power to make additions to or subtractions from the registered lists as may be necessary". Detailed provisions as to registration and deregistration of longshoremen have been negotiated. In 1958 a set of rules governing registration was adopted through collective bargaining (R. 123) and in 1963 supplementary provisions were adopted providing standards for advancing or dropping Class B men in the San Francisco area (R. 91w). The "1963 Rules" and the older "1958 Rules", to the extent that they have not been superseded, are parts of the collective bargaining contract involved in this appeal.

(c) The 1963 Rules preclude Class A registration for any man whose longshore work record shows that he is below grade on basic standards of work conduct. The rules appear in the record (R. 91w) and they have also been reproduced at page 29 of Appendix B to this brief. In summary, they preclude unlimited (Class A) registration for a man who has a record of dishonestly reporting his hours worked in order to obtain preference in assignments, or for failing to pay his pro rata share of the dispatching hall, or for having a poor record of availability for work, or for intoxication or pilferage.

C. Appellants failed to meet the registration standards adopted as part of the collective bargaining contract.

In 1959, applications were submitted from a large number of men seeking registration as Class B probationary long-

shoremen. From the many applicants, 742 men were selected. Plaintiffs were among that group (R. 754). In making his application for Class B status, each appellant in 1959 expressly acknowledged and agreed that:

> "Class B registration, if granted, shall be subject to agreements between the PMA and ILWU, or their successors, and to rules with respect to registration and deregistration established by said parties. . . ." (R. 4k)

Each applicant further agreed that he understood:

> ". . . [R]egistered longshoremen may be deregistered and . . . registration may be revoked in accordance with such agreements and such rules now in effect or hereafter to be agreed upon or adopted by the Association and the Union or their successors or by the Joint Port Labor Relations Committee". (R. 4k)

During the next few years the parties were carrying on precedent-making negotiations with respect to the industry's problem of needing to automate and to mechanize and the employes' problems of needing assurances of continued employment while operations were so modernized.[3] As a result, no men were advanced from the probationary status to full (Class A) registered status until 1963.

In the spring of 1963 the decision was made to advance the seniority of about 450 of the San Francisco probationary (Class B) longshoremen and so to give them fully registered (Class A) status. It was determined that all Class B men should be given the opportunity to file applications for Class A status and that those not qualifying under the agreed standards would be deregistered.

Notice of this opportunity was given and application

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3. Appellants demonstrate either a misunderstanding of or a disregard for this extensive undertaking. The modernization and mechanization fund, created as a result of collective bargaining, involved a contribution by PMA of 29 million dollars, not a mere 29 thousand dollars as erroneously indicated at page 18 of appellants' brief.

forms were made available (R. 755). All of the men then in Class B status, including appellants, applied to advance to Class A. Each in his application agreed that any complaints that he had regarding his application or his employment "will be handled under the grievance procedure set forth in the contract" and must be initiated within ten days of the publication or notice of the committee's action on the applications (R. 766). Each applicant also expressly acknowledged that his application and employment were governed by the ILWU-PMA contract and the registration rules in effect or "hereafter to be agreed upon or adopted by these parties or any Labor Relations Committee" (R. 766).

The joint union-employer committee reviewed the records it had as to the longshore work history of the applicants on the basis of the standards set forth in the 1963 Rules. On April 24, 1963, sixteen applicants were found to have failed to satisfy the standards, and they were removed from the Class B list and deregistered. On June 17, 1963, an additional 81 men were found to have failed to satisfy the standards, and they were also deregistered. Of the Class B men who applied for fully registered (Class A) status in 1963, 467 were found to have met the standards and they were given Class A status (R. 757).

Appellants are 51 of the 97 deregistered longshoremen (R. 757). The more relevant facts of the work records as to the appellants are summarized and appear in the record (R. 91q-91t). It is a lengthy list and we have reproduced it at page 23 of Appendix B to this brief. The list shows thirty-five of the 44 men were charged with violations of the low-man out rule; these totalled in excess of 603 hours dishonestly left out of the reports appellants submitted in getting dispatched to work. Forty-four men were charged with being late at least 365 times in making the

payments required of them under the collective bargaining contract for support of the dispatch hall. In addition, there were 5 suspensions for intoxication, 4 suspensions for refusing to work as directed, 3 suspensions for walking off the job, 6 reprimands for refusing to work as directed, and 11 probations for poor work availability.

Mr. Weir, alone of all the plaintiffs, filed an affidavit with the district court. He claims that the only reason he was deregistered was because of his activities opposing current leadership in the ILWU, his collective bargaining representative. He speaks of himself as the "leader and spokesman" of Class B men because he had been, to use his words, "unswerving in my defense of the rights and interests" of the "B" men (R. 313). He tells that because of his "leadership" of the Class B employes he "earned the enmity" of union and PMA officials and that he "gained their hostility" (R. 314). He tells how he opposed what was, in his opinion, a "short-sighted and ultimately defeating collective agreement" (R. 314). In this, he is referring to a modernization and mechnization plan under which the employers are contributing $29,000,000.00 for the benefit of longshoremen in return for the longshoremen waiving collective bargaining provisions that had theretofore barred automation of the industry on the Pacific Coast. He states that he had been told that his activities would bring down upon him the "wrath" of Harry Bridges and that he "would be deregistered at the first opportunity" because of his activities (R. 341).

D. Appellants' ineligibility for Class A seniority status was confirmed after hearings in grievance proceedings under the collective bargaining contract.

After the initial individual decisions were made on each of appellants' applications to advance to Class A status, each man was given notice and informed that he had an

opportunity to appear before the Joint Port Committee. Each appellant appearing was told of the matters in issue and was permitted to respond (R. 757-758). He was also told he could have a further hearing before a sub-committee of the Joint Port Committee to review the detailed facts on which the committee had acted in refusing his application (R. 757-758). In a few cases (none involving appellants) such hearings before the sub-committee brought to light errors in the facts in the particular cases and established that the men in question had indeed met the committee's standards; they were thereupon granted Class A status (R. 89-90).

In July 1963, when the respective decisions of the port committee to deregister each of the appellants became final, each man was informed of his right to file a grievance if he wished to attack the decision on the ground that there had been discrimination against him (R. 2). Each of the appellants herein filed a type-written grievance on July 27, 1963, in the following form (R. 2, 4L):

> "Dear Sirs:
>
> "Your committee de-registered me on June 17. On July 24, I received your letter denying my hearing appeal. In so doing you consummated an action that is discriminatory. You have not judged all the men involved by the same standards.
>
> "I appeal your decision and request another hearing as stipulated, where I will prove and document this discrimination.
>
> "I have never been able to get from you an official statement specifying the alleged charges against me, nor did your committee produce documents to substantiate the charges.
>
> "Would you please correct this situation for the next hearing."

As we shall discuss below, appellees were called upon during the ensuing period to defend unfair labor practice

charges brought by five Class B men who were deregistered at the same time as appellants.[4] During the same period, hearings were conducted on a large number of unemployment insurance claims filed by appellants herein and by others. Such hearings were held on November 6, 1963, and in 1964 on January 13, 15, 17, 20, February 3, 4, 5, 6, 7, March 2, 6, 30, 31, and April 1 (R. 198). The breaks in the hearing were principally due to collateral proceedings instituted by appellants' attorney (R. 759). The decision on the claims was not rendered until May 14, 1964 (R. 212).

The principal issue at the unemployment insurance hearings was not that of whether the man had or had not violated the standards for Class A registration but, rather, whether those violations, if any, would disqualify him for unemployment insurance under the peculiar tests set forth in the statute. The unemployment insurance issue could not be determined without a full investigation of the factual basis for the denial of full registration under the "1963 Rules". These factual questions were vigorously litigated by appellants' attorney and a full record resulted.

The transcript of the hearings became available to the Joint Port Committee in May, 1964 (R. 475); it was incorporated into the record of the committee when grievance hearings were commenced by that committee later that month (R. 90). The committee also ordered that this record be summarized in writing and made available to each of the appellants for assistance in preparing and presenting his case in the grievance-arbitration proceedings (R. 91v).

Further hearings on the grievances were held in October, 1964, after notice, and all appellants were given full oppor-

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4. The charges to which we refer were filed by the men on July 25, August 5, September 26, and December 2, 1963. After a field investigation, a complaint was issued by the San Francisco Regional Director on April 2, 1964 (R. 232).

tunity to present evidence to support, contradict, supplement and explain the summarized evidence and to argue the issues. The Joint Port Committee thereafter determined that each of the appellants had failed to meet the standards for Class A registration. Appellants were given a copy of the decision and were advised of their rights to appeal (R. 91a-91c).

Appellants' attorney addressed communications to the Joint Coast Committee. These were deemed to be an appeal from the ruling of the Joint Port Committee (R. 86). Counsel for appellants was informed that all men were invited to present their cases to the Joint Coast Committee at the designated time and place (R. 87, 91m). One man, Mr. Love, appeared at the Joint Coast Committee hearing. He was offered, but refused, the assistance of union counsel. He admitted that he failed to meet the standards to remain registered and limited his argument to an attack on the standards (R. 90-91).

The Joint Coast Committee, in its decision issued December 18, 1964, found that the registration standards comprising the "1963 Rules" had been applied fairly and uniformly and without discrimination and that each appellant failed to meet those standards (R. 86-91). Appellants' attorney was served with the decision the day it was rendered (R. 83). The Joint Coast Committee simultaneously gave notice (R. 84-85) to each grievor of his rights under Section 17.4 of the ILWU-PMA agreement (R. 4, page 69) permitting an appeal to the Coast Arbitrator and a review, by him, of the facts of the deregistration. The decision and order of the Joint Coast Committee (R. 86 et seq.) are reproduced as Appendix B to this brief.

It is uncontroverted that none of appellants or their attorney filed an appeal with the Coast Arbitrator (R. 83).

E. The NLRB has rejected any claim of unfair labor practices in the 1963 registration procedures.

Two sets of unfair labor practice charges were filed by the Class B longshoremen deregistered in 1963.

1. Appellants' charges of arguably unfair labor practices were untimely and were barred.

Most of the 51 appellants filed unfair labor practice charges against the union and against PMA on May 17, 1965, basing their charges on the very events and allegations contained in their complaint (R. 176-179). In their charge against PMA, they claimed:

> "1. On or about June 17, 1963, PACIFIC MARITIME ASSOCIATION and its member employers, in concert with INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (INTERNATIONAL) AND ILWU LOCAL NO. 10, caused the charging parties to be deregistered as Class "B" longshoremen in the Port of San Francisco: to be denied employment opportunities through the union hiring hall: to be denied the opportunity to be registered as Class "A" longshoremen and to receive the benefits of Class "A" registration.
>
> "2. On or about November 20, 1964, the above actions taken against the charging parties became final by reason of a decision by the Joint Coast Labor Relations Committee after appeal thereto pursuant to the grievance procedure set forth in the collective bargaining agreement then in force and effect.
>
> "3. The actions taken by the PACIFIC MARITIME ASSOCIATION and the International Union and Local No. 10, were taken without cause, without prior notice of the cause or reason for said actions, and were the results of discrimination and treatment based upon irrelevant, invidious and unfair considerations. In addition, said actions were taken against the charging parties because of their nonmembership in the afore-

mentioned union, resulted in interfering, restraining and coercing them from exercising their rights guaranteed by Section 7 of the Act." (R. 178)

The charges were referred to an examiner for investigation (R. 177, 178b), and on June 21, 1965 the NLRB informed the charging appellants (R. 176a, 180b) that their charges of "acts which arguably constitute unfair labor practices" could not be litigated before the Board because they had been filed after the expiration of the applicable six-months period of limitations specified in § 10(b) of the Act, 29 U.S.C. § 160(b).

2. Unfair labor practice charges, filed by other Class B men, were heard by the NLRB and were found to be without substance.

As stated above, unfair labor practice charges were filed against appellees in mid-1963 by five Class B men who had been deregistered at the same time as appellants (R. 231). The charges were timely; a complaint was issued.

After lengthy hearings a decision, setting forth detailed findings and conclusions, was issued by the trial examiner on May 4, 1965 (R. 263). He found a breach of the duty of fair representation, arbitrary, irrelevant and invidious action, and unlawful discrimination (R. 256). An appeal was then taken to the National Labor Relations Board, which considered the trial examiner's finding and conclusions and reversed his decision. *Pacific Maritime Association and International Longshoremen's and Warehousemen's Union, Local 10* [*Johnson Lee*], 155 NLRB 117, 60 LRRM 1483 (1965). We have included the Board's ruling as Appendix A to this brief as it does not yet appear in bound volumes of the reports.

It was the ruling of the Board that the discharges involved neither a breach of the duty of fair representation nor discrimination nor any other activity prohibited by the Act. Although the matters complained of were arguably unfair labor practice charges, they could not be proved

because the Board held that the discharges (the deregistrations) were based on legitimate lawful standards adopted in good faith in the collective bargaining process, with the purpose of selecting the best longshoremen for full registration status.

F. Appellants have had repeated opportunities to state any claims they might have on which a federal court may grant relief.

The appeal before this Court relates to the dismissal with prejudice of appellants' fourth amended complaint.

1. The history of the earlier pleadings is significant background to the district court's order here involved.

(a) The original complaint was filed in April, 1964.

The original complaint in this matter, filed on April 15, 1964 (R. 540),[5] alleged a purported violation of the ILWU-PMA collective bargaining agreement and claimed federal jurisdiction under § 301 of the Labor Management Relations Act. It was a 55-page document describing the deregistration of appellants as being the result of "arbitrary" and "discriminatory" action by the union and PMA. The defendants joined in a motion to dismiss the complaint, for summary judgment and for a stay pending arbitration (R. 595). On July 21, 1964, Judge Wollenberg granted the request of appellants and other plaintiffs for leave to file an amended complaint (R. 600).

(b) The first amended complaint was filed in August, 1964.

The first amended complaint, again seeking to allege violation of a collective bargaining contract and claiming federal jurisdiction under § 301, was filed on August 12, 1964 (R. 601). It took 65 pages to allege the same material as

5. A supplemental record was filed including many of these documents. Therefore the pagination of the record on appeal is not always chronological.

that contained in the original complaint. Appellees' motion to strike (R. 667) was granted by Judge Weigel on October 27, 1964 (R. 681).

(c) The second amended complaint was filed in November, 1964.

The second amended complaint, again claiming § 301 jurisdiction on the same basis, was filed on November 4, 1964 (R. 683). While it is shorter, being 45 pages in length, it incorporated by reference about 20 pages of "declaration" by counsel. It was still unintelligible in stating the facts to establish federal jurisdiction or in stating any claim entitling plaintiffs to relief in the district court. Motions to dismiss were filed on November 16, 1964 by PMA and by the other defendants (R. 743, 745). On January 12, 1965, Judge Weigel dismissed this complaint. He held that it failed to satisfy Rule 8 of the Federal Rules of Civil Procedure in that it "is neither a short nor a plain statement of any claim". He ruled that the complaint was "redundant and ambigous" and prohibited effective discovery as "defense lawyers could not safely determine issues of relevancy and judges could not safely decide them" (R. 768-772).

(d) The third amended complaint was filed on January 26, 1965.

A third amended complaint was filed on January 26, 1965 (R. 7). It was much shorter than plaintiffs' previous efforts. The only charge of this complaint was that the defendant union and defendant employers association entered into an agreement to deprive plaintiffs of their "right to work" and some undefined "right" to become fully registered longshoremen (R. 9-10). Section 301 was again relied on to support the claim of federal jurisdiction.

Beginning in late March, 1965, there was a succession of motions, declarations and correspondence to the district

court from individual appellants indicating a desire to discharge their attorney, Mr. Gordon (R. 530-531). Formal motions to substitute Mr. Brunwasser, Mr. Thau and Mr. Heisler as counsel for appellants were granted on May 20, 1965 (R. 531). A motion to dismiss the third amended complaint was filed by the union on June 8, 1965 (R. 106a) and by PMA a day later (R. 93). Counsel for appellants in this appeal then appeared and moved to sever their clients' case from that of the four plaintiffs who had elected to remain with Mr. Gordon (R. 531). On July 21, 1965, the third amended complaint was dismissed by Judge Harris without leave to amend (R. 181).

(e) The fourth amended complaint was filed during the summer of 1965.

On June 21, 1965, a "fourth amended complaint" was sent, by counsel for appellants herein, to the office of the clerk of the district court (R. 533) and copies were given to counsel for appellees. Motions to dismiss the fourth amended complaint (R. 130, 138) were similarly sent to appellants' present counsel by appellees. On August 16, 1965, after a hearing and over the protest of Mr. Gordon, Judge Harris granted appellants' motion for severance, permitted the fourth amended complaint of appellants herein to be filed and then took under submission the motions to dismiss directed to it (R. 534).

2. The allegations of the fourth amended complaint are before this Court.

The introductory ten paragraphs of the first "cause of action"[6] of the fourth amended complaint (R. 109-111) are incorporated by reference into the other four causes of

6. Appellee asserts that none of the several counts of the complaint states a "cause of action" for which the district court could provide a remedy. Appellants label each count "cause of action"; we shall use the same terminology for the sake of simplicity.

action (¶¶ 34, 42, 51, 55). Paragraph 1 alleges jurisdiction under § 301, that is, federal jurisdiction based on a claim of violation of a collective bargaining contract. Paragraphs 2 through 9 describe the parties. Paragraph 10 states the existence of the ILWU-PMA collective bargaining contract. The other pertinent provisions of the several causes of action are summarized below.

(a) The first cause of action, based on the theory of Steele v. Louisville & Nashville R.R., asserts a breach of fiduciary duty in amending the contract in 1963.

The first cause of action is described by appellants (App. Br. 7) as based on the legal theory of *Steele v. Louisville & Nashville R.R.,* 323 U.S. 192 (1944). It alleges that the ILWU had a "fiduciary duty" to represent appellants "fairly without arbitrary or hostile purpose, action or intent" (App. Br. 7-8). The allegation is made that this duty was breached when the 1958 registration procedures, attached to the complaint as Exhibit A (R. 123), were amended in 1963 (App. Br. 8).

The alleged facts of this claimed "breach of duty" are described in generalities. It is alleged that rules in regard to "registration and deregistration" were adopted in 1958 as part of the ILWU-PMA collective bargaining contract (R. 111, ¶ 11) and that, by an amendment in 1963, "new rules"[7] were adopted governing the standards for advancing applicants in limited (Class B) registration status to full (Class A) registration status or deregistering them (R. 111, ¶ 12). It is alleged that appellants were Class B employes and had been for four years (R. 112, ¶ 17), that on or about June 17, 1963 the defendants "jointly decided" to act, pursuant to the 1963 rules, to advance certain longshoremen to Class A and to deregister others (R. 113, ¶¶ 20,

7. In their brief, appellants have called these "the 1963 Rules" and we adopt their designation.

21), that appellants had no opportunity to be heard concerning the adoption of the 1963 rules (R. 113, ¶ 21), and that these rules were arbitrary and unfair (R. 113-114; ¶ 21, ¶ 22 and first ¶ 23). The foregoing allegations of facts are followed by allegations of conclusions. It is alleged that the old rules, of 1958, continued to be in effect without change at the time that appellants were deregistered despite the adoption of the 1963 Rules (R. 114, second ¶ 23). It is further alleged that the ILWU and Local 10 "by their negotiation of the amended rules which were substantively arbitrary . . . violated their fiduciary obligations to the plaintiffs to represent them fairly . . .". (R. 115, ¶ 30). The only allegation against PMA is that by joining in the negotiation of the 1963 rules, it ". . . participated in the denial of the plaintiffs' rights to fair representation" (R. 116, ¶ 31).

(b) The second cause of action, again on the Steele theory, asserts a breach of the duty of fair representation in applying the contract's 1963 amendment.

The second cause of action is also described by appellants as being based on the legal theory of *Steele v. Louisville & Nashville R.R.,* supra, 323 U.S. 192 (App. Br. 8-9). It is alleged that the union defendants arbitrarily and unfairly *applied* the 1963 registration and deregistration rules with "hostile discrimination" (R. 117, ¶ 39). The only charge against PMA in the second cause of action is that by "joining with" ILWU and Local 10 in this application of the 1963 rules, PMA participated in denying appellants their right to fair representation in the administration of the collective agreement" (R. 117, ¶ 40).

(c) The third cause of action asserts that the discharges of appellants involved "hostile discrimination" and were in violation of the contract.

The third cause of action, described as being based on § 301 (29 U.S.C. 185), alleges that appellants have been

denied Class A registered status and have been deregistered "by a final decision made by the Joint Coast Labor Relations Committee . . ." (App. Br. 9; R. 118 ¶ 42, incorporating ¶ 24). It is alleged that this action was in violation of "the clear terms of the collective agreement" (R. 119; ¶ 46) and in violation of appellants' "individual rights" under the collective agreement (R. 119; ¶ 47). Again, by incorporating paragraphs of preceding causes of action, the suggestion is made that "hostile discrimination" was to some extent involved in the adoption or application of the 1963 rules.

(d) The fourth cause of action claims that a conspiracy of the individual defendants led to the breach of duty alleged in the first cause of action.

The allegations of the fourth cause of action relate to actions of the individual defendants, each of whom is alleged to be an officer or official of a union defendant. It is alleged that they conspired with each other and with other defendants to cause PMA and the union to "pursue the wrongful and unlawful course of conduct" complained of in the first cause of action and that, in so doing, they acted intentionally and with malice "to deprive the plaintiffs and each of them of their status as registered longshoremen and of their rights and privileges as such. . . ." The complaint demands punitive damages from those individuals (R. 120; ¶ 52, 53, 54).

(e) The fifth cause of action claims that a conspiracy of the individual defendants led to the breach of duty alleged in the second cause of action.

The allegations of the fifth cause of action assert a conspiracy among the individual defendants relating to the facts alleged in the second cause of action. Punitive damages are again demanded from those individuals (R. 120-121; ¶ 56, 57, 58).

(f) The prayer asks for ordinary damages for a violation of contract and also for declaratory judgment, injunctive relief, mandatory relief and punitive damages.

The prayer of the complaint seeks money damages and a wide variety of other relief. It contains a demand by each plaintiff for loss of earnings from June 17, 1963 and for costs of suit; and each plaintiff demands punitive damages of $100,000.00. The plaintiffs also seek a declaratory judgment of the rights and duties of the parties. They demand that defendant be enjoined from deregistering them. They demand an injunction against implementing the 1963 rules relating to registration and deregistration. They demand that defendants be ordered to reinstate them as Class B longshoremen, to register them as Class A longshoremen and to grant them all the rights and privileges of Class A longshoremen. They also demand that defendants be enjoined permanently "from in any manner whatsoever interfering with the future employment of plaintiffs as longshoremen in the Port of San Francisco" and that the ILWU and Local 10 be enjoined from "purporting to act as collective bargaining representatives of plaintiffs so long as the unlawful conduct complained of herein continues" (R. 121-122).

3. Appellants admit on this appeal that there has been no violation of the no-discrimination clause of the collective bargaining contract.

Contrary to their allegations in their grievances filed under the contract's grievance-arbitration procedure, appellants in this Court expressly deny that their complaint or their appeal is based on any purported violation by PMA or any other defendant of § 13.1 of the ILWU-PMA agreement (R. 4; page 54). Appellants expressly state in their opening brief (page 72) that:

> ". . . the complaint of these plaintiffs does not fall within the ambit of the quoted section [§ 13.1] of the

collective agreement. Their complaint of unfair representation does not fall within it. Their complaint of discrimination does not fall within it."

Appellants thus expressly deny that they are basing their complaint or this appeal on any theory of discrimination against them in the adoption or application of the standards of the 1963 rules on the basis of any type of discrimination covered by § 13.1, including discrimination based on:

1. their nonmembership in the union; or
2. any activity by them for the union; or
3. any activity by them against the union; or
4. absence of any activity by them for the union; or
5. absence of any activity by them against the union; or
6. their race; or
7. their creed; or
8. their color; or
9. their religious beliefs; or
10. their political beliefs.

4. The district court dismissed the fourth amended complaint and rendered summary judgment in favor of appellees.

The factual information set forth in this Statement of the Case is drawn from affidavits supplied the district court by the parties. In granting appellees' motions to dismiss the third amended complaint, Judge Harris stated that he had considered "all the declarations and affidavits presented by each side and particularly the affidavits of B. H. Goodenough and J. A. Robertson (R. 1, 82, 176, 749). His order dismissing the third amended complaint was, therefore, an order for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

Judge Harris's order of October 8, 1965, dismissing the fourth amended complaint, recites the events by which the appellants herein were permitted to file that complaint. The order then continues:

> "In a formal order filed on July 20, 1965, this court stated the grounds for dismissing the Third Amended Complaint as follows: It appears to this court 'that it has no jurisdiction over the causes of action pleaded in the Third Amended Complaint, that exclusive jurisdiction over the alleged wrongful acts lies in the National Labor Relations Board, that this Court has no jurisdiction over the individually-named defendants, that it has no jurisdiction to issue the requested injunction due to the Norris-LaGuardia Act, that no breach of contract is or can be pleaded, that plaintiffs do not have standing to sue, that the applicable statute of limitations had expired prior to the filing of this action, and that plaintiffs, although given an opportunity to present their claim to an arbitrator, have failed and refused to do so. . . .'" (R. 501)

Summary judgment for appellees followed (R. 501-502).

The instant appeal by appellants is from the granting of this summary judgment. Timely notice of appeal was filed by appellants herein on November 2, 1965 (R. 505).[8]

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8. Mr. Gordon's clients filed a notice of appeal from the order dismissing the third amended complaint on August 2, 1965 (R. 534) and thereafter sought leave from this Court to file a petition for writ of mandamus and a stay of proceedings. The motions were denied on August 13, 1965. Mr. Gordon then sought leave to file a petition for writ of prohibition and this Court denied his request on September 7, 1965. On October 13, 1965, Justice Douglas denied a stay. The United States denied certiorari on January 17, 1966.

Mr. Gordon's clients had also filed a notice of appeal, directed to the fourth amended complaint, on November 5, 1965. On March 1, 1966, on motion of appellants herein, this Court dismissed their appeal. It declined to grant a stay on March 4, 1966. Mr. Gordon again filed a petition for certiorari, which the Supreme Court denied on October 10, 1966.

PMA has no knowledge of any activity by Mr. Gordon's clients to perfect their appeal from the order dismissing the third amended complaint. See, as to other proceedings, Appendix, p. 32.

SUMMARY OF ARGUMENT

Appellants were discharged from the probationary jobs they held as longshoremen in San Francisco when it was found, after some time in these jobs, that they did not meet the collective bargaining contract's standards to advance in seniority status to become part of the fully registered work force. Appellants asserted the contract was being violated and, as required by the contract, took their claims into the contract's grievance-arbitration procedure. The Joint Coast Committee decided that their discharges from probationary status were not contract violations. This decision was made by the contract parties, the union and the employer association, in the final joint step of the grievance-arbitration procedure. This is the last step short of submitting the question to the arbitrator. Although appellants clearly had the right to take their contract violation claims to the arbitrator, they chose not to exercise that right. Instead, by their fourth amended complaint they seek to set aside the administrative decisions that there was no contract violation.

This collateral attack in the federal court, appellants claim, is sustainable on one or both of two legal theories. One theory is that there was a breach of the duty of fair representation or "hostile discrimination" that permits review of the discharges. The other is that the contract was violated.

I. Appellants' first theory of their case is based on two propositions that have developed in Supreme Court decisions with respect to unions under the Railway Labor Act. First: a labor union, if it is acting as a bargaining representative exercising rights protected by federal labor law, must fairly represent all employes in the bargaining unit; it has a duty of fair representation. Second: if there is no administrative remedy to enforce this duty, the federal courts will provide a judicial remedy. These two propositions do not establish a cause of action or federal court

jurisdiction with respect to employes under the National Labor Relations Act. That Act provides a specific remedy for any discriminatory discharge of an employe resulting from a breach by the union of its duty of fair representation. There being no void to fill, this cause is governed by those opinions holding that the National Labor Relations Board's jurisdiction is exclusive and pre-empting.

Availability of the administrative remedy is also conclusively shown by the fact that appellants filed charges with the Labor Board raising the facts alleged herein. These were not litigated before the Board because they were not filed within the applicable time limitations. The courts do not provide a judicially established remedy for those who have failed to utilize the administrative remedy provided by statute.

What is more, the Labor Board has considered the specific claims of union-employer discrimination submitted by other men discharged under the same contract provisions and through the very same procedures and hearings that are attacked by appellants in the case before this Court. The Board held that there was no breach of the duty of fair representation in effecting these discharges.

II. Appellants' second theory is based on *Humphrey v. Moore.*

One necessary element of a *Humphrey v. Moore* contract violation cause of action is a showing that the union, in breach of its duty of fair representation, engaged in "hostile discrimination" in handling an employe's claim in the grievance-arbitration procedure. *Humphrey v. Moore* holds that a showing of such "hostile discrimination" will permit a court to disregard the normal finality of the administrative decision by the contract parties in the grievance-arbitration procedure and will permit the court to review and decide, itself, the substantive claim of contract violation.

The absence of any "hostile discrimination" is affirmatively shown. First, appellants specifically disclaim any discrimination of every type falling within this phrase. Second, there is no claim of procedural "hostile discrimination" at the Joint Coast Committee hearing. Third, while appellants allege some specific acts of "discrimination", they are not of the character necessary to open the door to judicial consideration of the substantive claim of the contract violation. One group of the facts reduces to a routine claim of substantive discrimination that is unlawful under the National Labor Relations Act, which is remediable only under the administrative procedures of that statute. The remaining facts add up simply to an example of the usual collective bargaining principle that seniority gives preference under the collective bargaining contract.

The other necessary element of a *Humphrey v. Moore* cause of action is a showing of a contract violation. Such a claim is predicated on § 301 of the Labor Management Relations Act of 1947, as amended, which gives jurisdiction to federal courts to hear claims of violations of collective bargaining contracts. Accordingly, an assertion of a violation of a specific contract clause is indispensable. Appellants can show no such violation; they can show only that the appellees followed and applied contract provisions that appellants might not have included in the contract if they had controlled the union. For this reason there is neither a § 301 cause of action nor federal jurisdiction.

There are other facts showing that appellants cannot establish the contract violation element of a *Humphrey v. Moore* cause of action. They do not have standing to sue on such a claim. Appellants were given the opportunity to litigate, with legal representation independent of the contract parties, all of their claims of contract violations in the grievance-arbitration procedure of the collective bargaining

contract. They used these procedures through the final union-employer joint committee step at the Joint Coast Committee, where a decision was rendered holding that their discharges were entirely proper under the contract. Appellants failed to exhaust the arbitration procedure when they decided not to exercise their right to take an appeal to the arbitrator from the Joint Coast Committee decision as permitted under the collective bargaining contract.

ARGUMENT

I. Summary judgment for appellees was proper as the district court had no jurisdiction to hear appellants' claims of a breach by the union of its duty of fair representation.

The first and second causes of action of appellants' fourth amended complaint are described by appellants at pages 7 and 8 of their brief as being based on an alleged breach by appellee unions of a duty to represent fairly the employes represented by them.[9] Appellants argue at length that there is such a duty. There is no serious doubt that the National Labor Relations Act imposes a statutory duty on a union to represent fairly all of the employees in its bargaining unit.[10] The issue in this Court is whether the district court had jurisdiction to hear such claims in view of the effective remedy and preempting jurisdiction of the National Labor Relations Board.

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9. Appellee Pacific Maritime Association was charged in these causes of action on the basis that it participated with the unions in denying plaintiffs' rights to fair representation. (R. 116, 117) Since the fourth and fifth causes are dependent on the basic legal issues in these first and second causes, the law we here present on the remedies for this breach of duty disposes of these four causes.

10. We suggest that appellants' lengthy discussions of Railway Labor Act cases to support an undenied proposition established by the National Labor Relations Act, and elaborated in Board and court opinions, infers their need to evade the fact that the Board now provides a remedy for all breaches of the duty to provide fair representation.

A. The opinions cited by appellants are not in point as they are based on a lack of administrative remedy.

Appellants begin the "Argument" in their brief with a 25 page discourse devoted almost entirely to the "*Steele* line of cases" arising under the Railway Labor Act. *Steele v. Louisville & Nashville R.R.,* supra, 323 U.S. 192 (1944), *Tunstall v. Brotherhood of Locomotive Firemen, etc.,* 323 U.S. 210, 213 (1944), *Brotherhood of Railroad Trainmen v. Howard,* 343 U.S. 768 (1952), *Conley v. Gibson,* 355 U.S. 41, 44 (1957), and *Gainey v. Brotherhood of Railway etc. Clerks,* 313 F. 2d 318, 322 (3 Cir. 1963). The cases upon which appellants put such heavy reliance are immediately distinguishable from the case at bar. All stand for proposition that the Railway Labor Act has no provision enabling an individual employe to seek or obtain administrative relief for hostile discrimination against him by the union having the federally sanctioned power to represent him in collective bargaining.

In the *Steele* case the Supreme Court discusses at length the wording of the Railway Labor Act and the failure of that Act to grant the Mediation Board or the Railroad Adjustment Board any effective authority to handle disputes between an employe and his collective bargaining representative. The Court noted the statutory inability of the Mediation Board to offer relief and stated that the Adjustment Board "could not give the entire relief here sought" and that it had "consistently declined in more than 400 cases to entertain grievance complaints by individual members of a craft represented by a labor organization" (323 U.S. at 205). The Court then held, "We cannot say that a hearing, if available, before either of these tribunals would constitute an adequate administrative remedy" (323 U.S. at 206). The holding of the *Steele* line of cases is that the federal courts stand open to provide a remedy for breach

of the duty imposed by statute where there is no administrative remedy.

Appellants refer briefly to two cases involving the National Labor Relations Act, in which a judicial remedy was provided in the absence of an administrative remedy. The first, *Wallace v. Labor Board,* 323 U.S. 248 (1944), arose before the 1947 amendment ("Taft-Hartley"), a time when the Act included no specification of union unfair labor practices and no authority to impose effective sanctions against unions. The second, *Syres v. Oilworkers International Union,* 350 U.S. 892 (1955), arose in an unusual way and involved a refusal of Fifth Circuit courts to protect Negro employes from flagrant racial discrimination.

Syres and others, who were members of a totally segregated Negro local, filed a complaint against a totally segregated white local of their same union and against their employer. There was a contract between the two labor organizations requiring the white local to negotiate fairly on behalf of the Negro local. Plaintiffs charged that the white local, in violation of the contract, had used the collective bargaining process to reach an agreement with the employer under which the members of the Negro local would be denied any future promotion. Plaintiffs alleged that this discrimination was based solely on their race and was in violation of the contract between the two unions. The district court for the Eastern District of Texas dismissed the action. The Fifth Circuit affirmed, stating that all of the plaintiffs were members of the union "by their own voluntary consent" and that the matters of which they complained did not require an interpretation of the National Labor Relations Act or any other federal law but rested on a claim that in dealing with the issue of promotion the white local breached the agreement with the Negro local that it would protect the Negroes in the collective bargaining ne-

gotiations (223 F. 2d at 743).[11] The dismissal of the action was affirmed without any comment in the majority opinion on the defendants' contentions that the plaintiffs' only remedy was under the administrative machinery of the National Labor Relations Board.

Judge Rives dissented. His opinion states that discrimination based solely on racial grounds is an unfair labor practice under § 8 of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) and § 158(b)(3). It also states that this federal law imposes a duty of fair representation applicable to all employes in the bargaining unit. In this, Judge Rives was following the clear language of the Supreme Court in *Wallace v. Labor Board,* supra, 323 U.S. 248 (1944). He then turns to the matter of remedy and asks whether the National Labor Relations Board "in this case" could provide an adequate administrative remedy for discrimination "because of race or color" in violation of the duty of fair representation.

Citing *Steele v. Louisville R.R.,* supra, 323 U.S. 192 (1944) and *Brotherhood of Railway Trainmen v. Howard,* supra, 343 U.S. 768 (1952), the dissenting opinion states:

> "There are no adequate remedies available to appellants under the National Labor Relations Act or through the Board. . . . Nowhere is the Board given power to prevent discrimination because of race or color, except by very limited procedure which would afford no adequate remedy in this case.

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11. In view of the opinions of the Supreme Court since 1955 it is now clear that the Fifth Circuit majority opinion was in error in holding that federal law was not involved. Section 301 expressly grants district courts jurisdiction over ". . . suits for violation of contracts between . . . labor organizations . . . ." In 1955 there was serious disagreement among the circuits whether state or federal law was the applicable substantive contract law to be applied and exercised in § 301 jurisdiction. *Association v. Westinghouse Elec. Corp.*, 348 U.S. 437, 443-456 (1955). It is now well established that federal law applies. *Teamsters Union v. Lucas Flous Co.,* 369 U.S. 95, 102-104 (1962).

> ". . . There is . . . no administrative means by which the Negro members can secure adequate separate representation for the purposes of collective bargaining. Decertification by the Board would afford no remedy at all. The alleged discriminatory contract would remain in full force after any decertification."

The Supreme Court, in a memorandum opinion handed down only 69 days after the Fifth Circuit denied a rehearing, granted certiorari and set aside the actions of the lower courts, citing *Steele, Howard* and *Tunstall,* all of which held that the federal courts could provide a judicial remedy as federal law imposed a duty with no administrative remedy for its breach.

Since the decision in *Syres,* it has become indisputably clear that the NLRB is now providing the administrative remedy that Judge Rives found lacking in 1955. It has repeatedly been held that there is such an NLRB remedy for discrimination because of race. It is routine that there is an NLRB remedy for discrimination because of intra-union dissension.

1. *The Labor Board has jurisdiction to provide administrative relief for the discrimination here alleged.*

The courts have from time to time stated, in substance, that § 8 of the Act is designed "to allow workers to exercise freely the right to join unions, to be good, bad, or indifferent members, or to abstain from joining any union without imperiling their right to a livelihood." See *NLRB v. Bakery Workers Local 50,* 339 F. 2d 324, 328 (2 Cir. 1964), citing *Radio Officers Union v. NLRB,* 347 U.S. 17 (1954). This policy has repeatedly been followed by the Board and the courts. We shall discuss several cases.

In *NLRB v. Local 138 International Union of Operating Engineers,* 293 F. 2d 187 (2 Cir. 1961), the court considered an order of the Labor Board relating to a case involving

rival factions within the union. It stated, "[A] small number of determined members, perhaps ten of a total membership of some twelve hundred, whom we shall call, without implication, 'reformers' have waged an intensive campaign to overturn [the] local president . . . and other incumbent officers for what the reformers consider to be gross mismanagement and improper administration of union affairs." (293 F. 2d at 189). Other members of the union on several occasions refused to work with the "reformers". The reformers were threatened with denial of employment. A number of the reformers were denied use of the union's hiring hall. The reformers who had been denied use of the hall were able to obtain only occasional employment. The Board's order included numerous provisions directing the union to stop such activities and to permit the reformers to resume work and to continue to work in jobs covered by the union's contracts. The Board's order protecting the reformers occupies over seven pages of the Board's printed reports being found at pages 1411 through 1418 of 123 NLRB. The scope of this order, in fact, was so broad that the Court of Appeals determined it should be modified prior to enforcement. (See 293 F. 2d at 199.)

NLRB v. Bakery Workers Local 50, supra, 339 F. 2d 324 (2 Cir. 1964) involved a rather simple situation in which a worker, Fisher, was denied the seniority status to which he was entitled under the collective bargaining contract because of a union objection based on an apparently rather technical failure on his part in proceeding in accordance with certain general rules of the union. The trial examiner found, and the Board sustained his finding, that Fisher was denied his contractual seniority and, on this basis, that the refusal of employment by the employer was "a result not sanctioned by contract but indeed contrary to its provisions

governing loss of seniority" (143 NLRB at 237). On the ground that the act forbids discrimination "not only between union members and non-members or between good members and bad members but in all decisions which depend primarily upon union membership considerations" (339 F. 2d at 327) the court enforced the order requiring reinstatement of Fisher with full back pay.

In *Local 212, United Automobile Workers,* 128 NLRB 952 (1960), the Board dealt with a termination of employment with Chrysler Corporation of a man, Taylor, who had been provoked by a union representative into striking the first blow in a dispute with another employee so as to subject him to discharge under the company's regular procedures. The Board found that the fight was a pretext and that the union had sought to get Taylor off the company's employment rolls because he was "agitating" for the "Society of Skilled Trades", a rival of the Automobile Workers. A representative of the union told Taylor on one occasion when he was distributing the Society's literature, "You don't want to stick around here, do you. . . . We are going to throw you out of here if you don't stop passing out that Society's literature." The union was directed to advise Chrysler that it had no objection to the company's employing Taylor, to make Taylor whole for any loss of pay he may have suffered, to cease and desist from harassing adherents of the Society of Skilled Trades and to cease and desist from threatening them with loss of employment or physical violence if they engaged in activities on behalf of that Society. The order apparently was not taken to the courts.

A group of longshoremen, in the New York area, refused to pay certain amounts to a union official after the union had by majority vote agreed to make "a personal gift" to the union official. After the members of one gang of longshoremen refused to make the "gift", they were told that

they would "starve" and the union would "get rid of them". A Board order was entered directing the employer, among other things, to reinstate, with back pay, the employes who had been discharged because of the union's opposition to them. 116 NLRB 667. This order was enforced by the Court of Appeals for the Third Circuit. *NLRB v. Inparato Stevedoring Corp.,* 250 F. 2d 297 (3 Cir. 1957). (The ILWU does not represent longshoremen in the New York area.)

NLRB v. United States Steel Corp., 278 F. 2d 896, 898 (3 Cir. 1960) involved an employe who was a member of the union "who had been involved in disputes with officials of the local on the manner in which they conducted union affairs . . .". The Board found that he had been denied employment because of union opposition to him and concluded that unfair labor practices had been committed by the union and by the employer (122 NLRB at 1324, 1329, 1331). The court enforced the Board's order, stating:

> "The order for the most part was in the usual form. It directed reimbursement to Russell for any loss of pay he may have suffered during the short period in which it was found that he was discriminated against, and directed the union to withdraw its objections to his employment. It required the posting of the usual notices. While the cease and desist provisions forbidding discrimination went beyond the Morrisville plant of the respondent company, we do not think that there is adequate ground for complaint on this item." (278 F. 2d at 898-899.)

In *Local Union No. 12, Rubberworkers v. NLRB,* 368 F. 2d 12 (5 Cir. 1966) the court dealt with a collective bargaining contract that "appeared to provide for plantwide seniority without regard to race or sex" (368 F. 2d at 14). As a matter of fact Negro employes were consistently

passed over in favor of white employes with less seniority in regard to promotions, transfers, layoffs and recalls. Grievances had been filed by the Negroes and not processed by the union. The opinion states:

> "The facts of this controversy once again present the critical challenge of striking a meaningful balance, consistent with existing labor policy, between individual employee rights and the continued effectiveness of the collective bargaining process." (368 F.2d at 16.)

The opinion discusses in detail the cases involving "fair representation" and sustains the conclusion of the Board "that petitioner's breach of the duty of fair representation constitutes an unfair labor practice under § 8(b)(1)(A) of the Act" (368 F. 2d at 24).

2. The NLRB could provide a remedy for the wrongs set out in the conclusions appellants plead, if a timely charge had been filed and the allegations established.

Stanley Weir's affidavit states he was selected for discharge because he had vigorously and consistently opposed the established order of things within the ILWU. He refers to his repeated attacks on Harry Bridges and to his outspoken criticism of the contract amendments that Bridges was heralding as major gains for the longshoremen, but which Weir was vociferously assailing as invidious impositions on the men for whom he was speaking.

At this time, no contention can be made that appellants were without an administrative remedy for the alleged breach of duty of fair representation of which they complain herein. As discussed in our Statement of the Case, the National Labor Relations Board assumed jurisdiction over similar, if not identical, allegations filed by five men deregistered at the same time that appellants were deregistered. *Pacific Maritime Association and International Longshoremen's and Warehousemen's Union Local 10*

[*Johnson Lee*], 155 NLRB No. 117, 60 LRRM 1483 (1965). Hearings were held and the charges litigated. The trial examiner, in his findings as to the facts of the deregistration action, concluded there had been unfair labor practices on the legal theory the Act makes it an unfair labor practice to discharge an employe, or otherwise to discriminate against him, on the basis of irrelevant, invidious or unfair considerations, citing *Miranda Fuel Co., Inc.,* 125 NLRB 454. His decision provided for an order that the union and the association (1) reinstate with back pay those he concluded were victims of a breach of the duty of fair representation and (2) cease and desist from any discrimination in breach of this duty. However, the Board *reversed his decision on the facts,* finding there was no breach of this duty. Thus, while agreeing with his position as to the substantive law and the available remedy, it concluded that appellees had in no way committed unfair labor practices in deregistering appellants' co-workers.

Indeed, appellants themselves have recognized that the Labor Board provides a remedy for the conduct they complain of in this appeal. They filed unfair labor practice charges against both PMA and the union alleging NLRB jurisdiction. The charges against PMA and the ILWU (R. 178, 179) alleged that § 8(a)(1)(A), 29 U.S.C. 158 (a)(1)(A), and § 8(b)(2), 29 U.S.C. 158(b)(2), were violated. They stated:

> ". . . [The discharges] were the results of discrimination and treatment based upon irrelevant, invidious and unfair considerations. In addition, said actions were taken against the charging parties because of their nonmembership in respondent union, and resulted in interfering, restraining and coercing them in the exercise of their rights guaranteed by Section 7 of the Act." (R. 178)

These charges were investigated by the San Francisco regional office of the Board. Thereafter, the Regional Director responded (R. 232) that he was refusing to issue the complaint as more than six months had elapsed "after the commission of the acts which arguably constitute unfair labor practices".

3. The Steele line of cases will not support a judicial collateral attack on a grievance decision on grounds for which the NLRB gives an administrative remedy.

The cases cited above, few of the many reported, establish that there is an administrative remedy for "hostile discrimination" or any breach of the duty of fair representation by a union subject to the National Labor Relations Act. This fact establishes that the cases relied upon by appellants to support their first, second, fourth, and fifth causes of action are not in point. The summary judgment for appellees on these causes must necessarily be sustained.

B. There is no court jurisdiction over claims asserting only a breach of the duty of fair representation or other unfair labor practices under the National Labor Relations Act.

The NLRB has primary jurisdiction to hear all charges that assert, even arguably, unfair labor practices as defined in §§ 7 and 8 of the National Labor Relations Act, 29 U.S.C. §§ 157 and 158. With only one exception (discussed in section II below) the statutory jurisdiction of the Board is exclusive and pre-empting. The leading case defining this doctrine of pre-emption is *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 244-245 (1959). The *Garmon* rule has been applied consistently by the United States Supreme Court. *Plumbers, Steamfitters, etc. v. County of Door,* 359 U.S. 354 (1959); *Marine Engineers Beneficial Association v. Interlake S.S. Co.,* 370 U.S. 173, 174, 176-177

(1962); *International Association of Bridge, etc. Workers v. Perko,* 373 U.S. 701, 706 (1963); *Hattiesburg Building & Trades Council v. Broome,* 377 U.S. 126, 127 (1964).

Appellants assert that they were deregistered and denied the advance to Class A seniority status, requested by the applications they filed, because the ILWU preferred other applicants for irrelevant, invidious and unfair considerations (App. Br. 17-19). They assert they are victims of discrimination in regard to their employment status as longshoremen because one of them, Weir, criticized the ILWU, Harry Bridges, and the contract permitting the mechanization and modernization of cargo handling on the Pacific Coast waterfront (App. Br. 18; R. 331-339), and others of appellants were his sympathizers (R. 331). Appellees agree that discrimination against a group of dissenters in the bargaining unit - whether they be good, bad or indifferent union members or non-members - is a violation of the National Labor Relations Act. Appellants have so asserted in their charge filed with the NLRB (R. 178). The only forum that can hear these claims is the National Labor Relations Board.

1. This Court has ruled that the subject matter of this lawsuit is within the exclusive jurisdiction of the NLRB.

This Court in *Alexander v. Pacific Maritime Association,* 314 F. 2d 690 (9 Cir. 1963), expressly recognized the preempting authority of the National Labor Relations Board to consider and determine charges that were remarkably similar to those in the instant case. In *Alexander* it was alleged that the plaintiffs there (ship clerks) had been denied registered status through arbitrary action of the ILWU and the PMA favoring union members, that contract provisions had been negotiated to discriminate in favor of union members, and that the union and the employers had complied with

these contract provisions so that preferential treatment in registration was given favored applicants with less experience in the industry than the plaintiffs because they were in better graces with the union (314 F. 2d at 693-694). This Court stated:

> "Many of the cases cited [by plaintiffs] arose under the Railway Labor Act, which makes no provision for administrative means for correcting breaches of duty of fair representation. The remaining cases cited involved acts of discrimination which were not, even arguably, unfair labor practices under the National Labor Relations Act . . . While resort to the federal courts was proper under those circumstances, it would be improper here in the face of the competance of the National Labor Relations Board to handle the alleged discrimination." (314 F. 2d at 692; portion in brackets supplied.)

2. *Other courts have similarly held that the subject matter of this lawsuit is within the exclusive jurisdiction of the NLRB.*

The lead of this Court in *Alexander* was followed by the Eighth Circuit in a recent opinion, *Woody v. Sterling Aluminum Products, Inc.,* 365 F. 2d 448 (8 Cir. 1966). The complaint in *Woody* is remarkably similar to the charges of the first and fourth cause of action here, which assert that the union in conspiracy with PMA breached its duty of fair representation by negotiating the 1963 amendment to the collective bargaining contract, the 1963 Rules by which registration standards were made effective. In *Woody,* it was charged that there was a conspiracy between the union and the employer in collective bargaining negotiations and that the parties bargained in bad faith to plaintiffs' detriment because the union failed to represent plaintiffs fairly and honestly (365 F. 2d at 456).

The Eighth Circuit affirmed the dismissal of the complaint holding that it was not within the jurisdiction of the district court because the charges made were within the exclusive jurisdiction of the Labor Board (365 F. 2d at 456). The same result had been reached in other cases, which with the cases cited above are discussed in more detail below. *Chasis v. Progress Mfg. Co.,* 256 F. Supp. 747 (E.D. Pa. 1966); *Adams v. Budd Company,* 349 F. 2d 368 (3 Cir. 1965); *Beausoleil v. Furniture Workers,* .... N.H. ...., 64 LRRM 2174 (1966); *Barunica v. United Hatters,* 321 F. 2d 764 (8 Cir. 1963); *International Longshoremen's and Warehousemen's Union v. Kuntz,* 334 F. 2d 165 (9 Cir. 1964); *See v. Local 417,* 64 LRRM 2224 (E.D. Mich. 1967). Also see *Republic Steel Corp. v. Maddox,* 379 U.S. 650 (1965).

3. The Alexander decision has not been overruled or limited.

Despite the fact that this court's opinion in *Alexander has* been approved and applied by several courts in the cases cited above, appellants assert "that the holding of *Alexander* concerning jurisdiction of the National Labor Relations Board is no longer valid in light of the subsequent decisions in *Humphrey v. Moore* and *ILWU v. Kuntz*" (App. Br. 55). This assertion is made at the end of the section of their brief discussing these cases and *Hardcastle v. Western Greyhound Lines,* 303 F. 2d 182 (9 Cir. 1962) cert. den., 371 U.S. 920 and *Ford Motor Co. v. Huffman,* 345 U.S. 330 (1953). The assertion is wrong.

The basic holding of *Alexander,* supra, is that the National Labor Relations Board has exclusive jurisdiction over any claim of breach of the duty of fair representation in the negotiation of a collective bargaining contract or in amending such a contract. The opinion recognizes, however, that the federal courts do have jurisdiction where

alleged conduct constitutes a violation of the collective bargaining contract even though that same conduct is a violation of the National Labor Relations Act because it constitutes a breach of the duty of fair representation. This is the reason why this Court, in *Alexander,* sent the case back to the district court to permit plaintiffs an opportunity to amend their pleadings to allege a breach of contract.

The *Kuntz* case in no way suggests that the federal courts have jurisdiction over a claimed breach of the duty of fair representation unless it is allegedly the cause of a specific violation of a collective bargaining agreement. In fact, the plaintiffs in *Kuntz* asserted that their action was a suit for breach of contract under § 301, and so different from *Huffman* and *Hardcastle* (334 F. 2d at 170). The plaintiffs in *Kuntz* argued that the amendment of the pre-existing contract to change their rights under that contract was a breach of contract under § 301. This Court rejected this contention that a contract amendment was a violation of "vested" contract rights and so litigable under § 301. It then went on to hold that there could not be any possible basis for setting aside an amendment to a collective bargaining contract unless there was a "bad faith motive, an intent to hostilely discriminate" (334 F. 2d at 171). However, the opinion in no sense suggests that the only showing necessary for courts to set aside a collective bargaining contract amendment is a showing that there has been a breach of duty of fair representation. The opinion does not state what will establish a cause of action; it merely holds that plaintiffs did not state a cause of action by what they presented.

This Court earlier considered a similar type of question and disposed of it on the preliminary point of the specificity necessary in pleading a breach of the duty of fair representation. *Hardcastle v. Western Greyhound Lines,*

supra, 303 F. 2d 182 (9 Cir. 1962) cert. den. 371 U.S. 920. The opinion sustained the summary judgment granted by the district court, holding that a cause of action was not stated by allegations that a new seniority clause "arbitrarily, unfairly and capriciously" took away the seniority that the plaintiffs had under the superseded seniority clause. The opinion states (303 F. 2d at 187), "The appellants herein have done nothing more than present facts showing a dissatisfaction with a result adopted by a majority of the union of which appellants are members." This Court, in sustaining the summary judgment dismissing the complaint, does not hold that plaintiffs would state a cause of action upon which the federal courts may grant relief if the specified defects had not been involved. All this Court did was to point out some areas where plaintiffs' case was fatally defective.

The Supreme Court's opinion in *Humphrey v. Moore,* supra, 375 U.S. 335 (1964), in no way suggests that *Alexander* has been overruled. In fact, the *Humphrey* opinion directly accords with this Court's opinion in *Alexander.* The Supreme Court held there was § 301 jurisdiction in *Humphrey* because there were allegations of violation of specific language in the collective bargaining contract there involved. The Court stated that relief could have been granted had the plaintiffs established that there was a breach of the duty of fair representation in carrying on the grievance procedure and that the resulting grievance decision was a violation of the collective bargaining contract. In *Alexander,* this Court took the entirely consistent position that a cause of action under § 301 was not shown simply by allegations of a breach of the duty of fair representation.

The opinion of the United States Supreme Court in *Ford Motor Co. v. Huffman,* supra, 345 U.S. 330 (1953)

does not indicate that the Supreme Court has ever held that the federal courts will hear issues as to the duties of fair representation applicable to unions acting under the National Labor Relations Act *where there is no other substantive federal law basis* for federal court jurisdiction of the issues being litigated. Federal jurisdiction in *Huffman* was based on the claim that a 1946 modification of the collective bargaining contract at Ford Motor Company "violated his rights, and those of each member of his class, under the Selective Service Act of 1940. . . ." (345 U.S. at 332). A somewhat similar issue had previously been before the Supreme Court in *Aeronautical Industrial District Lodge 727 v. Campbell,* 337 U.S. 520, 529 (1949). The Court's opinion in that case states:

> "Of course, the Selective Service Act restricts a readjustment of seniority rights during the veteran's absence to the disadvantage of the veteran. But it would be an undue restriction of the process of collective bargaining (without compensating gain to the veteran) to forbid changes in collective bargaining arrangements which secure a fixed tenure for union chairmen, whereby veterans as well as nonveterans are benefited by promoting greater protection of their rights and smoother operation of labor-management relations.
>
> "All this presupposes, obviously, that an agreement containing the 1945 provisions expresses honest desires for the protection of the interests of all members of the union and is not a skillful device of hostility to veterans."

In light of the then existing law, just quoted, the *Huffman* opinion discusses in detail the nature of collective bargaining under the National Labor Relations Act, the authority of the collective bargaining representative under that Act, the need of the representative to have a wide range of reasonableness in seeking to come to an appro-

priate resolution of the inevitable differences arising in "the manner and the degree to which the terms of any negotiated agreement affect individual employees and classes of employees" (345 U.S. at 338), and the general nature of seniority. It concluded (345 U.S. at 333), that the International, as collective bargaining representative, had the authority to negotiate and agree to the provision attacked by Huffman and accordingly affirmed the district court's summary judgment dismissing the action.

In the course of the opinion (345 U.S. at 332, foonote 4) the Court considered the contention, first raised in the Supreme Court, that the Labor Board had exclusive jurisdiction with respect to the claim that the union had engaged in hostile discrimination or had failed to act in complete good faith and honesty of purpose in the exercise of its discretion in negotiating the seniority clause. In the footnote, the Court disposed of this argument saying, "Our decision interprets the statutory authority of a collective bargaining representative to have such breadth that it removes all ground for a substantial charge that the International, by exceeding its authority, committed an unfair labor practice." It then referred to the "somewhat comparable question considered in connection with the Railway Labor Act" in *Tunstall v. Brotherhood of Locomotive Firemen,* supra, 323 U.S. 210 and *Steele v. Louisville & Nashville R.R.,* supra, 323 U.S. 192, 204-207. The thrust of the entire opinion asserts that the federal courts will determine whether the collective bargaining clause under attack is a valid clause adopted without breach of the duty of fair representation where this is necessary in carrying out the court's jurisdiction to decide a case properly before it with respect to the seniority status of a man returning from military service.

The federal courts must decide this issue; the courts could not send it to the Labor Board.

Alexander was correctly decided. It continues to state the law.

4. *The prayer of the complaint asks the court to usurp powers that Congress has found require the expertise of the Labor Board for their proper exercise.*

The prayer of the complaint (R. 121-122) goes far beyond seeking damages for contract violation; it demands forms of relief that the NLRB usually grants in the exercise of its exclusive jurisdiction. First, the prayer asks for an order (of a sort consistently and appropriately given by the NLRB) requiring (a) that appellants be reinstated with back pay, and (b) that they be treated without any further "discrimination" (R. 122). Section 10 of the National Labor Relations Act authorizes this type of relief when the board finds it will effectuate the policies of the Act. Second, the prayer asks the court to declare invalid the contract provisions setting out the 1963 promotion standards adopted by the union and PMA in collective bargaining (R. 121); thus they obviously ask the federal court to find that the parties did not bargain collectively in accordance with the Act's requirements and to conclude the requested remedy would effectuate the policies of the Act. Third, it also asks for an order to enjoin the union and the employers from carrying on their ordinary collective bargaining with respect to appellants' registration (R. 121), although such bargaining is required by the National Labor Relations Act in the absence of some Labor Board order changing the ordinary requirements of the law. Fourth, the prayer asks the court to enter another order of a sort entered by the Labor Board, but only rarely because it has such

a drastic effect on the ordinary conduct of the collective bargaining required by the Act; it asks the court to enjoin the union from acting as a collective bargaining representative of employes within the bargaining unit so long as it continues the activities of which appellants complain (R. 122). Fifth, it further asks for a broad order enjoining appellants from "in any manner whatsoever interfering with the future employment of plaintiffs" (R. 122). This would prevent the employers from discharging appellants for good cause; it would prevent the union from agreeing that a discharge of an appellant was proper. It would preclude the union and the employers from conducting the ordinary day-to-day work of processing collecting bargaining grievances that might arise with respect to appellants' performance of their work.

The foregoing establishes, we submit, that appellants' prayer for relief verifies our position that if appellants have a cause of action at all, it is one over which the NLRB has exclusive jurisdiction. The prayer asks the court to invade the heart of the Board's jurisdiction and to substitute its judgment for the Board's expertise. The prayer raises issues that are of such delicacy in the field of collective bargaining that they must be retained within the exclusive jurisdiction of the Board. It alone has the peculiar experience to determine which of the remedies here sought would, in the proper situation, effectuate the policies of the Act. The Supreme Court in *San Diego Building Trades Council v. Garmon,* supra, 359 U.S. 236, 240-243 (1959), discusses at length the expertise of the Labor Board and its exclusive jurisdiction. It then quotes from *Garner v. Teamsters, C & H Local Union,* 346 U.S. 485, 491, on the role of the Labor Board in administering the National Labor Relations Act:

"Congress did not merely lay down a substantive rule of law to be endorsed by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules or substantive law. . ."

II. Summary judgment for appellees was proper as the district court had no jurisdiction under the purported § 301 claims because of appellants' failure to establish the necessary prerequisites for such a cause of action.

A statutory exception to the *Garmon* rule (of exclusive NLRB jurisdiction over unfair labor practices is found in § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a). Appellants rely on this section to support federal jurisdiction as to the third cause of action (App. Br. 9).

A. Only suits for violation of contracts between a union and an employer or between unions are within the § 301 jurisdiction relied on by appellants.

Section 301 jurisdiction requires allegations of a violation of some right arising out of a collective bargaining contract. The purpose of § 301 is to give a court remedy to anyone injured by a violation of such a contract. This is implicit in the cases that have considered the scope of § 301 jurisdiction.

1. Smith v. Evening News Association.

In *Smith v. Evening News Association,* 371 U.S. 195 (1962) plaintiff alleged facts to show that the applicable collective bargaining contract contained an express provision that the employer would not discriminate against any employe because of his membership in the union. He then alleged facts to show that during a period when his employer was not operating because of a strike non-union employes were permitted to report to work and collect full wages while he had been refused the same privilege when he reported, ready and willing to work (371 U.S. at 196). The Supreme Court held that he had the right, under § 301, to have the district court hear his claim, which the Court characterized as one to "vindicate individual employee rights arising from a collective bargaining contract" (371 U.S. at 200).

The significance of *Smith v. Evening News Association* is twofold. First, if an individual employe is to invoke district court jurisdiction under § 301, he must be able to allege violation of a right "arising from [his] collective bargaining contract". Second, he must be able to establish his standing to sue by illustrating that the right involved is an "individual employee right" and one that is *individual and personal* to him. We shall demonstrate that appellants have not and can not satisfy either of these prerequisites and that there is, therefore, no jurisdiction in the district court to consider their complaint. Furthermore the Court recognized that it would have to resolve the issues should a conflict between court and administrative jurisdiction arise in handling facts that were both a contract violation and an unfair labor practice under the Act (371 U.S. at 197-198 n. 6).

2. Humphrey v. Moore.

Humphrey v. Moore, 375 U.S. 335 (1964) involved two companies ("E & L" and "Dealers") that had operated in the same geographic area. They agreed to split the area between them and each agreed to retire from the other's now exclusive area and to this end, to transfer facilities back and forth. A dispute arose among the employes of the two employers as to who should be laid-off and who should continue to work.

The employes of both companies were represented by the same union and had similar or identical collective bargaining contracts. The contracts contained identical provisions regarding the employes' seniority rights. E & L was the older company, and its employes generally had greater seniority than those at Dealers; any dovetailing of the seniority lists would mean a displacement of many of Dealers' employes. Both contracts also included an identical clause, § 5, regarding the resolution of disputes arising out of mergers or absorptions. The grievance procedure was also the same in both collective bargaining contracts. It provided for referral first to a local joint union-employers committee and, next, to a Joint Conference Committee in Detroit. The decision of the Joint Conference Committee was to be binding unless it could not agree on a decision. In that event, the dispute was to be submitted to arbitration.

The seniority dispute was referred to the local committee. It did not settle it. It was then referred to the Joint Conference Committee, where it was decided that the seniority lists be dovetailed. Many of Dealers' employes (including plaintiff Moore) lost their jobs under this decision.

Moore, acting for himself and all others in his situation, filed a complaint in the Kentucky state court seeking an

order retaining Dealers' employes in their jobs. *There were allegations of a hostile, false, deceitful, conniving, dishonest breach of the duty of fair representation in the conduct of the grievance procedure before the Joint Conference Committee.* Moore alleged that the local union president had told Dealers' employes that they had nothing to worry about and had thus lulled them into a false sense of security. He contended that, as a result, they were denied the opportunity of making their contentions fully known to the Joint Conference Committee in its consideration of the grievance. He also alleged that the union president had purposely deadlocked the local committee in order to effect this discrimination against the Dealers employes. There were further detailed allegations of "false and deceitful" action, of "connivance", and of "dishonest union conduct in breach of its duty of fair representation" in the Joint Conference Committee proceedings. There were allegations that the employes were deprived of a Joint Conference Committee hearing by the acts of the local union president (1) in espousing the cause of rival group within the union after having deceitfully connived against plaintiffs and (2) in deceiving the Dealers employes by indicating that the union would support their cause in the grievance procedure. *There were allegations of a violation of § 5 of the contract.* The pleadings asserted that the decision of the Joint Conference Committee, which changed plaintiffs' seniority standing so that they would be discharged, was the result of an incorrect interpretation and application of the collective bargaining contract in that § 5 precluded dovetailing of seniority in the circumstances.

The Kentucky trial court denied the injunction sought by Moore, but the Kentucky Court of Appeals reversed and granted it. It held, in effect, that the Joint Conference Committee violated § 5 of the contract when it decided the grievance by ordering dovetailing of seniority on the ground that

the change in the operation of the companies was not a merger or absorption that would give the Joint Conference Committee jurisdiction under § 5. On this basis, it held the administrative decision modifying the Dealers seniority list to be in violation of the contract. Certiorari was granted.

The Supreme Court majority opinion holds that judicial relief could be granted *if* the Joint Conference Committee had erred in changing seniority status so as to affect jobs, and *if* the change was arbitrary or capricious, and *if* the Joint Conference Committee procedure had been poisoned by the union's breach of its duty of representation in handling the seniority issue in the grievance proceeding at the Joint Conference Committee level. The Court held that Moore had sufficiently pleaded that his contract rights had been violated and had pleaded that this contract violation had occurred as a result of union activity in the administration of the grievance procedure that was in breach of his right to and its duty of fair representation. Therefore, the Court concluded, Moore had standing to sue, the court was not bound by the Joint Conference Committee decision if Moore established the breach of the duty of fair representation pleaded, and the court could itself then determine whether the jurisdictional fact under § 5 of a merger or absorption had been established.[12]

No suggestion is made in Humphrey v. Moore that a mere charge of "unfair representation" in the abstract, a charge unrelated to the conduct of the hearing leading to the decision under the grievance-arbitration procedure of the collective bargaining contract that is under attack, *is sufficient to allow a court to decide the meaning of the contract in an*

12. The Court thereupon reviewed the allegations in the light of the union's right and need to take actions that may affect some employes adversely, while benefiting others. It reversed the Kentucky Court of Appeals decision and affirmed the trial court's action dismissing the complaint.

action under § 301. Furthermore, there must be a violation of an individual and personal right. The third cause of action fails to meet these requirements of *Humphrey v. Moore.*

3. Alexander v. Pacific Maritime Association.

This Court considered the subject of § 301 jurisdiction in *Alexander v. Pacific Maritime Association,* 314 F. 2d (9 Cir. 1963), cert. den., 379 U.S. 882. Indeed, as we have shown in detail at pages 42-49 above, the *Alexander* complaint was remarkably similar to that in the instant case. This Court, after considering the December, 1962, Supreme Court decision in *Smith v. Evening News Association,* which came down after the appeal in *Alexander* had been filed in this Court, concluded:

> "The question is whether the alleged acts of discrimination constitute a breach of the collective bargaining agreement as well as an unfair labor practice under the [National Labor Relations] Act. *In our view, they do not.*" (314 F. 2d at 694; emphasis supplied.)

This Court should affirm the dismissal of appellants' complaint just as it affirmed the dismissal of the *Alexander* complaint. This complaint, like the *Alexander* complaint, alleges no violation of any right arising out of the collective bargaining contract. While a no-discrimination clause now appears in the ILWU-PMA Agreement as § 13.1, appellants expressly state at page 72 of their brief that neither their complaint nor their appeal is based on any alleged breach of this section.

4. Woody v. Sterling Aluminum Products, Inc.

Woody v. Sterling Aluminum Products, Inc., supra, 365 F. 2d 448 (8 Cir. 1966), also concerned claims of unfair representation in the negotiation of the collective bar-

gaining contract. The court ruled that such claims did not state a cause of action for breach of contract under § 301:

> "Our remaining jurisdictional issue concerns those allegations in Count I, charging the Union with conspiring and colluding with Sterling, bargaining in bad faith to plaintiffs' detriment, and failing to represent plaintiffs fairly and honestly. The District Court held that the plaintiffs' charges of the Union's bad faith in negotiating the collective bargaining agreement were not predicated upon the collective bargaining agreement so as to give the court jurisdiction under § 301, but rather looked beyond the agreement to the exclusive bargaining representatives' obligation of fair representation and was within the exclusive jurisdiction of the National Labor Relations Board."

The court then considered the claim that *Moore* would support court jurisdiction under § 301. The critical distinction was stated:

> "Unlike Moore, however, plaintiffs' allegations here are not contract oriented and not, therefore, 'within the cognizance of federal and state courts.'"

In conclusion the court stated (365 F.2d at 457), "[T]o rule jurisdiction might well jeopardize the whole concept of collective bargaining as we know it."

5. Chasis v. Progress Mfg. Co.

In another 1966 opinion, Chief Judge Clary of the Eastern District of Pennsylvania dismissed a complaint, like appellants' herein, alleging hostile discrimination. *Chasis v. Progress Mfg. Co.,* 256 F.Supp. 747 (E.D. Pa. 1966). After reviewing the history of § 301 jurisdiction since *Humphrey v. Moore,* he ruled that such charges, unless they can be related to a violation of a specific provision of the collective bargaining contract, do not support jurisdiction under § 301 but are, at best, mere charges of unfair labor practices within the exclusive jurisdiction of the NLRB.

6. Adams v. Budd Company

The complaint in *Adams v. Budd Company, et al.,* 349 F. 2d 368 (3 Cir. 1965) spoke of arbitrary, capricious, malicious acts of the company and union. It charged conspiracy and collusion to defraud plaintiffs and others similarly situated of their "vested rights". It was further charged that the union breached its duty of fair representation (349 F. 2d at 369).

The defendant union argued that the claim was not based on *violation* of the collective bargaining contract but "solely upon the adverse affect upon plaintiffs of the *negotiation* of such an agreement" and, as such, it was not a claim properly within the district court's § 301 jurisdiction. The Court of Appeals for the Third Circuit held that the union's contention was well-taken:

> "Here the plaintiffs do not seek redress for violation *of* a collective bargaining agreement; what they seek is redress for an alleged violation *by* a labor contract of rights which they assert were independently, and pre-agreement, vested in them by their 'contract of hire'." (349 F. 2d at 370; emphasis the court's.)

7. Barunica v. United Hatters.

In *Barunica v. United Hatters, etc.,* 321 F. 2d 764 (8 Cir. 1963), the plaintiff claimed that she was a member in good standing of the defendant union, was qualified and able-bodied and willing to work at her trade, but that the union had refused to refer her out to employment and had deprived her of her equal rights. It is alleged that the union had deprived her of earning a living and in doing so had acted with malice. Upon considering possible § 301 jurisdiction and after referring specifically to the Supreme Court's opinion in *Smith v. Evening News Association,* the court ruled that there was

no § 301 jurisdiction. It held the complaint set out a "routine allegation of an unfair labor practice" within the exclusive jurisdiction of the NLRB and affirmed the judgment of dismissal (321 F. 2d at 766).

8. International Longshoremen's & Warehousemen's Union v. Kuntz.

In *International Longshoremen's & Warehousemen's Union v. Kuntz,* 334 F. 2d 165 (9 Cir. 1964), the plaintiffs claimed that the federal court had § 301 jurisdiction because there was a breach of the collective bargaining contract. They said there was a breach in that the pre-existing contract was amended so as to strip them "of a 'a vested right', namely a preferred seniority status previously granted by the defendants". Plaintiffs argued that § 301 invoked traditional contract law so that the amendment of the contract was a breach of the pre-existing contract. After quoting from *J. I. Case Co. v. NLRB,* 321 U.S. 332 at 336 (1944), this Court held that "traditional contract law" would not apply so as to permit an employe covered by the contract to assert that its amendment was a breach of the contract.

9. Appellants have not shown a violation of the collective bargaining contract.

Five motions to dismiss their complaints have afforded appellants opportunity to specify the clause of the ILWU-PMA collective bargaining agreement that they contend has been breached. They have never been able to give an answer. Rather, they attempt to cloud the issue by equating their statutory remedies with remedies afforded under totally different statutes. They have not, and they cannot, identify any clause of the collective bargaining contract that they allege has been breached. For this reason, inter alia, their complaint was properly dismissed.

B. Where a § 301 action attacks a decision in the grievance procedure under a collective bargaining contract, the plaintiffs must allege that there has been "hostile discrimination" in the grievance procedure that has led to a grievance decision violating the contract.

The third cause of action is based on *Humphrey v. Moore,* supra, 375 U.S. 335 (App. Br. 61). We have analyzed this case in detail at pages 53-56 above. There we show that the Supreme Court holds that a § 301 action may set aside a decision in the grievance procedure of a collective bargaining contract if it is both a violation of the existing contract and a product of "hostile discrimination". This means, as a corollary, that where a decision is reached in the contract grievance procedure in which the union has satisfied its duty of fair representation of the individual employes involved, the grievance procedure decision is a final decision as to any issue of contract violation. It is one that will not be reviewed in the courts under § 301. *General Drivers Union v. Riss & Co.,* 372 U.S. 517, 519 (1963).

1. *Appellants have not satisfied the pleading requirements for alleging "hostile discrimination" or a breach of the duty of fair representation.*

It is well established that allegations of concrete facts - in contrast to general conclusions of arbitrary, capricious or unreasonable activity or unfair, invidious and irrelevant considerations - are necessary to plead a claim of breach of the duty of fair representation. This Court has set forth the law on this subject in great detail in *Hardcastle v. Western Greyhound Lines,* supra, 303 F. 2d 182 (9 Cir. 1962) cert. den. 371 U.S. 920. The detailed discussions of the pleadings involved in the Supreme Court's opinion in *Humphrey v. Moore,* 375 U.S. at 349-351, show that the principles in this regard laid down by this Court are law in all the circuits.

A review of the allegations of the complaint indicates that appellants have failed to satisfy the requirements of the cases just cited. The first count speaks generally of "unfair" and "arbitrary" action by appellees in adopting the 1963 rules; however, the only specific allegation is that appellants were not invited to participate individually in the collective bargaining negotiations (R. 115).[13] The second count speaks generally of "unfair" and "arbitrary" action by appellees in applying the rules; however, the only specific allegation, one totally unsupported by any affidavit, is that other Class B men were advanced who did not meet the standards (R. 117).

The third count is the count based on the *Humphrey v. Moore* theory (App. Br. 61). It merely charges that the appellees' decisions to deregister the appellants were "not rationally related to the longshore labor requirements of the Port of San Francisco" (R. 118, ¶ 42, incorporating ¶ 25), that PMA participated "in the denial of plaintiffs' rights to fair representation" (R. 118, ¶ 42, incorporating ¶ 31) and that appellees' actions in refusing appellants Class A status were "wrongful as heretofore alleged" (R. 119, ¶¶ 48 and 49). These allegations do not satisfy the requirements discussed by the Supreme Court at pages 349 to 351 of its opinion in *Humphrey v. Moore*.

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13. The suggestion that the ILWU and the PMA cannot amend a contract without the union's giving notice to every employe it represents who would be affected by the negotiations and giving each an opportunity to appear and present argument on the proposals is novel and disturbing. Perhaps appellants have taken this position as a result of their emphasis on Railway Labor Act cases. That Act provides a massive structure restricting bargaining and establishing a special statutory procedure for adjusting grievances and gives specific procedural rights to individual employees. See 45 U.S.C. § 153(j). The inadequacies of industrial relations under the Railway Labor Act are well known. Congress chose to provide a more workable structure under the National Labor Relations Act. See *J. I. Case Co. v. National Labor Relations Board,* 321 U.S. 332, 334-339 (1944).

2. *The record affirmatively shows that there has been neither "hostile discrimination" nor a breach of the duty of fair representation.*

The contract amendments attacked by appellants are valid contract provisions. The collective bargaining history set out in affidavits submitted by appellee PMA shows that the 1963 contract provisions on seniority and registration,[14] and particularly those establishing the standards under which appellants were deregistered, were adopted in the ordinary course of collective bargaining. No contentions of fact are presented by the affidavit of appellants that raise any litigable issue with respect to the collective bargaining history set forth in appellee PMA's affidavits. There is no implication that the amendments were directed at union dissidents or any other minority. Compare *Aeronautical Industrial District Lodge 727 v. Campbell,* supra, 337 U.S. 520 at 529 (1949).[15] The facts before this Court show that these contract provisions were adopted in accordance with the exercise of the reasonable discretion that a union must be accorded in negotiating on such subjects as seniority. See *Ford Motor Co. v. Huffman,* supra, 345 U.S. 330, 337-339 (1953), *International Longshoremen's & Warehousemen's Union v. Kuntz,* supra, 334 F. 2d 165, 171 (9 Cir. 1964).

Undisputed facts before this Court also show that appellees' conduct in the grievance arbitration machinery with respect to appellants' 1963 grievances was beyond reproach. The factual claims presented by appellants in no way conflict with the facts shown in the affidavits submitted by appellee PMA with regard to the procedure followed in handling the grievances that appellants filed in July, 1963. The affidavits show that a full record was developed based on exhaustive litigation in adversary hearings in which

14. Appellants call these "the 1963 Rules".

15. The relevant language is quoted at page 47 above.

appellants were represented throughout by counsel chosen by them. It shows full opportunity for appellants to appear at the hearings, to have in front of them a detailed summary of the first hearings which was prepared for the use of the committee, to offer all evidence that they desired to offer, to present whatever argument they might wish - whether orally or in writing - using their own freely selected counsel for these purposes. The affidavits show that the appellants were given every opportunity to participate in the proceedings and to present their cases but that appellants consistently ignored their opportunities while preserving their positions through their perfunctory arguments and their timely appeals until they received the final decision by the Joint Coast Committee. In no way is there any claim that any facts exist showing that the union went beyond its recognized proper function of sorting out good grievances from bad grievances and making the collective bargaining process work by agreeing with the employer where there clearly was not merit in the grievances at issue. *Humphrey v. Moore, supra,* 375 U.S. 335, 349-350 (1964); *Local Union No. 12405, Mineworkers v. Martin Marietta Corp.,* 328 F. 2d 945 (7 Cir. 1964); *Ostrofsky v. United Steel Workers,* 171 F. Supp. 782 (D. Md. 1959), aff'd 273 F. 2d 614 (4 Cir. 1960), cert. den. 363 U.S. 849.[16]

The National Labor Relations Board has held that there was no hostile discrimination or breach of duty of fair representation by the ILWU in the negotiation and the administration of "the 1963 Rules" in deregistering other Class B longshoremen. Claims were presented to the Board

16. The per curiam opinion of the Fourth Circuit states: "For the reason that the plaintiffs utterly failed to cooperate with the union . . ., we think the union was neither unreasonable nor arbitrary in refusing to prosecute the grievances of the plaintiffs. Consequently, no right of action has accrued to them against the union or against their former employer."

asserting that the charging parties had been victims of a breach of the duty of fair representation as a result of the 1963 contract negotiations and the administrative decision to deregister made by the Joint Port Committee in June, 1963. After extensive hearings, the trial examiner reached conclusions that the limited registration (Class B) longshoremen were deregistered by the June action of the Joint Port Committee for "irrelevant, invidious, and unfair reasons" (R. 231, 256). However, when the issues were presented to the Board, it concluded that there had been no breach of the duty of fair representation by the ILWU and that the Class B longshoremen deregistered had properly been denied an improvement in their seniority status and had been properly discharged. (See Appendix A to this brief.)

Appellants specifically disclaim any reliance on discrimination of the only type that is suggested in the record before this Court. They specifically assert that their complaint in court is not based in any way on acts by the union or the employers that would amount to discrimination in violation of § 13 of the collective bargaining contract (App. Br. 72). This section makes it a contract violation to discriminate "in connection with any action subject to the terms" of the contract so as to effect a breach of the duty of fair representation or hostile discrimination as it has been defined by the courts. It is beyond controversy that all of the assertions of fact presented by appellants' affidavit regarding hostile discrimination or breach of the duty of fair representation are within the ambit of § 13. If appellants in their brief assert that some other discrimination occurred, they in no way attempt to define it. (Cf. App. Br. 72).

Perhaps appellants stated their disclaimer in the hope that they would be able to avoid the consequences of their

not using the arbitration step in the grievance-arbitration remedy for claims of § 13 violation. However, by their disclaiming reliance on § 13 discrimination - whatever may have been their reason therefor - appellants have admitted there is no litigable issue as to any claims that such discrimination occurred. Compare *International Longshoremen's & Warehousemen's Union v. Kuntz,* supra, 334 F. 2d 165, at 170, note 7 (9 Cir. 1964). It is clear, we submit, that there is not even a suggestion of a fact of any other type of discrimination, if there be any other type.

C. Appellants have no standing to assert a contract violation because they failed to exhaust the grievance-arbitration procedures of the collective bargaining contract they claim was violated.

Appellants' complaint asks the court to set aside the decision of the Joint Coast Committee of December 18, 1964 (R. 114, ¶ 24). However, no excuse can be offered for appellants' failing to take their grievance to arbitration. It is interesting to note that appellants in their brief, despite their attempt to discredit the integrity of the Joint Port Committee and the Joint Coast Committee, make no attempt to discredit the integrity of Professor Kagel, the Coast Arbitrator. We suggest that appellants are aware of Professor Kagel's professional and personal reputation and that such an attack would be unavailing.

1. *Appellants failed to appeal the decision of the Joint Coast Committee to the arbitrator.*

In paragraph 24 of the complaint, appellants allege that they have "exhausted all appeals provided under the collective agreement and that their appeals have been rejected . . ." by the Joint Coast Committee, described by them as "the highest appeal body available to the plaintiffs for appeal of their grievance" (R. 114). The record proves the inaccuracy of this allegation. It is conclusively established

that appellants have not exhausted their arbitration remedies under the collective bargaining agreement (R. 83).

Appellants apparently seek to support the contention that they have exhausted the grievance-arbitration procedure by asserting that the procedure available to them was that provided in §§ 17.23, 17.26 and 17.261 of the contract (App. Br. 16-17, 70-73). These clauses have no relation to the discrimination grievances that appellants filed in July of 1963, which led to the Joint Coast Committee decision that is here under attack. These grievances were filed after the Joint Port Committee gave notice that it was sustaining the deregistration of appellants.

Each appellant had available to him at that time a specific contract grievance-arbitration procedure for any claims of discrimination. In this procedure, he could litigate claims that he had been denied his contract rights because of "hostile discrimination" or a breach of the duty of fair representation. The procedure is set forth in the sections beginning with § 17.4, which reads:

> "17.4 When any longshoreman (whether a registered longshoreman or an applicant for registration or a casual longshoreman) claims that he has been discriminated against in violation of Section 13 of this Agreement, he may at his option and expense, or either the Union or the Association may at its option and at their joint expense, have such complaint adjudicated hereunder, which procedure shall be the exclusive remedy for any such discrimination."

The remedy is begun by filing a grievance with a Joint Port Committee (§ 17.41). The individual involved is permitted to appear and state his case, and to present oral and written evidence and argument. Either of the contract parties or the man involved may take an appeal from the Joint Port Committee to the Joint Coast Committee (§ 17.42). The Joint

Coast Committee considers the matter and issues its decision (§ 17.421). An appeal from its decision may be presented to the Coast Arbitrator by either of the contract parties or by the individual involved, but no later than seven (7) days after issuance of the committee's decision (§ 17.43). These procedures are the exclusive remedy for claims of discrimination (R. 4, page 65).

In July, 1963, after they were notified of their deregistration, appellants herein each filed his grievance with the Joint Port Committee claiming that it had "consummated an action that is discriminatory" in discharging him. They asked for hearings "to prove and document this discrimination" R. 2, 4 L, see above, page 14). Their grievances were thereafter handled as ones for discrimination under § 17.4 et seq. of the contract."[17]

On May 29, 1964, while those grievances were pending before the Joint Port Committee, B. H. Goodenough's affidavit was filed in this litigation. It expressly stated that if any man should be dissatisfied with the decision of the port committee on his pending grievance ". . . he has the right to carry it on through the grievance step (as set forth in § 17.4 through 17.431 . . .), first to the Coast Labor Relations Committee and then to the Coast Arbitrator . . ." (R. 2-3). As discussed in our Statement of the Case, pages 14-16 above, appellants and their attorney were given every opportunity to appear, present evidence and make oral argument at every level of these proceedings.

As we have also set out, the record is clear that: (1) appellants did not appear at the Joint Port Committee hearings although they, and their counsel, were expressly

17. We trust the Court will not be misled by appellants' charges that appellees "for their own ulterior purposes" designated appellants' grievances as "complaints of discrimination" long after the within litigation was commenced (App. Br. 73).

invited, (2) they did receive a copy of the decision and appealed this decision to the Joint Coast Committee, (3) they did not follow through on their appeal to the Joint Coast Committee by appearing at its hearing, except for one appellant, and they filed no more than a perfunctory argument, and (4) they did not even attempt to resort to the most crucial and ultimate step - before this impartial and highly competent arbitrator - after receiving the decision of the Joint Coast Committee.

2. *Those who seek to enforce a collective bargaining contract are required by law to exhaust the remedies provided in that contract.*

Federal labor law is strikingly consistent in favoring arbitration as the means of settling industrial and employment disputes. *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957); *United Steelworkers v. American Manufacturing Company,* 363 U.S. 564 (1960); *United Steelworkers v. Warrior and Gulf Navigation Co.,* 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960); *Drake Bakeries v. Local 50,* 370 U.S. 254 (1962); *Smith v. Evening News Association,* 371 U.S. 195 (1962); and *Carey v. Westinghouse Electric Corp.,* 375 U.S. 261 (1964). This policy favoring arbitration is so strong that the Supreme Court, when asked to enforce a contract's provision for arbitration, stated:

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers v. Warrior & Gulf Navigation Co.,* supra., 363 U.S. 574, 582-583 (1960)

A more recent opinion, in *Republic Steel Corp. v. Maddox,* 379 U.S. 650 (1965), holds that Congress has expressly ap-

proved contractual grievance procedures as a "preferred method for settling disputes and stabilizing the 'common law' of the plant" (379 U.S. at 653).

> ". . . Federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* to use the contract grievance procedure agreed upon by employer and union as the mode of redress." (379 U.S. at 652.)

One who is seeking, under § 301, to enforce the terms of a collective bargaining agreement should not be permitted to avoid remedies provided for his relief in that contract.

> "A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements' [Cases cited.]" (379 U.S. at 653).

Nothing in *Maddox* suggests that an individual employe may simply ignore the grievance machinery. He must *attempt* to use it. If he wants to excuse his not using that machinery, he must be able to allege facts to show that the union has refused to press his claims or has only perfunctorily represented them in the grievance procedures. This cannot be done in this case because the ILWU-PMA agreement gives to the *individual employe* himself the right to initiate his grievance, to press his claim through the various stages of hearing, and finally to appeal to an impartial arbitrator, a man whom he agreed would serve as arbitrator.

We submit that the failure to exhaust the grievance-arbitration procedure establishes that appellants do not have the necessary standing to sue. Cf. *Smith v. Evening News Assn.*, 371 U.S. 195, notes 1 and 9 (1962).

3. Appellants' efforts to escape the consequences of not appealing to the arbitrator are unavailing.

Appellants claim a preliminary hearing was "unfair" to them. Appellants make conclusionary allegations that they were denied a fair hearing by the Joint Port Committee when their requests to set aside their deregistrations were first considered by the committee during the proceedings in which appellants directly participated. For instance, they state (without offering record references) that "all the fundamental criteria of procedural fairness were absent or refused". They state:

> ". . . There can be no doubt that the plaintiffs did attempt to use the contract grievance procedure, that the union not only refused to assist them but, in fact, acted as their prosecutors and that the plaintiffs found these procedures inadequate to protect their interests after a strenuous attempt to implement them." (App. Br., p. 75).

Appellants state in their brief that they have "shown" that the proceedings involving the deregistration "were largely a farce", that they were denied counsel, etc. (App. Br. 82-83). But still no record references are offered. We are referred only to the Weir affidavit (R. 289) in general. *And the Weir affidavit deals only with the proceedings prior to the time the grievances were filed attacking the acts of the port committee as being discriminatory.* There is nothing relevant in the Weir affidavit that indicates that appellants were denied a fair hearing in the grievance hearings considering their charges of discrimination. To the contrary, for example, they were represented by coun-

sel throughout the lengthy Unemployment Insurance hearings when the basic grievance procedure record was made and their counsel was used throughout the port and coast steps to present argument and file appeals.

Aside from the foregoing, it is clear that appellants can show no injury arising out of the conduct of the preliminary hearing.

Quite clearly the grievance machinery with respect to the claims of discrimination is to give a remedy to any man who feels that he has not previously received a fair hearing because, *inter alia,* he is hostile, bad, or indifferent in his relations with his union, or is a "reformer", or is critical of the union, its officers and its collective bargaining policy. The grievance machinery of the ILWU-PMA Agreement, § 17.4 et seq., gives the individual longshoreman an administrative remedy similar to the judicial remedy spelled out by the Supreme Court in *Humphrey v. Moore.* It provides a remedy to anyone who claims that he has been denied rights guaranteed to him under his collective bargaining contract by the union's breach of its duty of fair representation. Having instituted grievances in this special grievance-arbitration procedure and having carried through to the final decision of the Joint Coast Committee, the contention that they need not go to the arbitrator *because they were denied fair representation by the union at the earlier hearing under review* is utterly specious.

Appellants are not in a situation such as that of the teamsters in *Humphrey v. Moore.* There, the employes alleged that they had been deprived of vested contractual seniority rights by the union president's improper activity *during the grievance proceedings.* No facts have been alleged by appellants, or even suggested, giving rise

to such a claim in *this* complaint. On the contrary, they have alleged that they have exhausted their contractual grievance-arbitration remedies by proceeding through the Joint Coast Committee (R. 114, ¶ 24). Now, being faced with a record that indicates conclusively that they did not complete those steps, because they elected not to appeal that committee's decision to arbitration, they attempt to suggest reasons why they might have been excused from taking the steps that they *did* take, such as filing their initial discrimination grievance with the Joint Port Committee, or appealing from its decision and participating, although perfunctorily, in the Joint Coast Committee's proceedings.

Appellants also claim delay as an excuse. Appellants' brief offers citations of supposed authority for their contention that the eight-month delay in the grievance procedure before they filed suit constituted sufficient excuse for them to disregard the final step of the grievance-arbitration procedures. Assuming for purposes of argument that delay might justify a refusal to proceed in the grievance procedure, we point out (1) that the facts here show no "delay" and (2) that appellants and their attorney used the discrimination grievance-arbitration procedure until the Joint Coast Committee issued its decision.

We shall not repeat here the facts concerning the multitude of proceedings, including many court hearings on procedural questions raised by appellants herein, following the 1963 deregistration. This is adequately discussed in our Statement of the Case (See 15-19, above). The preparation of the record for the disposition of the grievances through the adversary process at the unemployment insurance litigation was, as we have said, a lengthy process. That record was made available in May, 1964. Grievance

hearings were held that same month, and this record was incorporated into the grievance record. The Joint Port Committee ordered preparation of a summary of the record and directed that copies of the summary be made available to all appellants. From the time appellants were given the opportunity to respond to the summary in September, 1964, to the time of the Joint Coast Committee's decision on December 18, 1964, only *three* months were involved. In view of these facts, the claim of "delay" cannot now be used as an excuse for the failure to appeal the decision of the Joint Coast Committee to the arbitrator. No case to the contrary is cited.

Appellants refer to the statement in *Born v. Cease,* 101 F.Supp. 473 (D. Alaska, 1951), referring to the need for "plain, speedy and adequate" remedies in appeals within labor unions (App. Br. 76). The court in that case noted that although the defendant union and the defendant union trustee claimed a defense that Born had failed to exhaust internal union appeal remedies, neither defendant had offered into evidence the union constitution purportedly giving plaintiff such a right to appeal. The court speculated that such a right might not exist (as plaintiff claimed) and then repudiated the claimed defense by saying that Born had no "plain, speedy and adequate" remedy. No mention whatsoever is made of the time factor involved. The court thereupon dismissed the complaint for lack of jurisdiction, holding that the matters of which Born complained were within the exclusive jurisdiction of the NLRB (101 F.Supp. at 475-477).

Appellants also cite *Booth v. Security Mutual Life Ins. Co.,* 155 F.Supp. 755 (D. N.J., 1957), a diversity of citizenship suit against trustees for breach of trust as to trust funds. The court held that plaintiffs need not wait

for the defendant trustees *to sue themselves for fraud.* It held that the usual rule requiring exhaustion of internal remedies would not therefore be applied. The opinion had no bearing on the instant appeal.

In *Flaherty v. McDonald,* 178 F.Supp. 544 (S.D. Calif., 1959), another diversity of citizenship case involving internal union matters, plaintiffs were former union officers who were suing to regain control of the local from the present officers. The court recognized that the general rule would require them to exhaust their internal remedies. It stated that in this particular case, however, time was unquestionably "of the essence" in that justice demanded an adjudication of plaintiffs' rights prior to the convening of the international union's convention.

Appellants' citations of cases arising out of the specific four-month time limit provisions of the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 411, et seq., are clearly not in point. No similar provisions are found in the National Labor Relations Act or, more precisely, in § 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

CONCLUSION

The complaint and the evidentiary material submitted by affidavits show that there was no triable issue of fact in the district court. The Joint Coast Committee issued its decision holding that the "1963 Rules" were a part of the contract and applicable, that they had been uniformly applied to all applicants, that appellants had each failed to meet the standards of these rules, and that the foregoing facts established that appellants had not been the victims of any discrimination prohibited by the contract. There is no basis for a collateral attack on this grievance decision.

Appellants' claim that the *Steele* line of cases permits the federal courts to review the contract amendment and this grievance decision is without merit. The cases cited are not in point. There is an administrative remedy. It is adequate. It is what Congress has provided. It is exclusive.

There is no merit to appellants' use of the *Humphrey v. Moore* theory. Appellants have not shown there is any factual issue regarding the findings of the Joint Coast Committee that there was no violation of the ILWU-PMA collective bargaining contract. Furthermore, appellants have failed to exhaust the exclusive administrative remedy for any claim of contract violation they might have. The proper remedy for any appellant who seriously believed that his deregistration was a contract violation because of a breach of the duty of fair representation was to litigate his complaint in the contract's grievance-arbitration machinery for discrimination issues. Appellants, through their lawyers, took all of their claims of contract violation through this route, short of the arbitration by the Coast Arbitrator, Professor Sam Kagel. They then permitted the decision against them to stand without an appeal.

The applicable policy of federal law favors the use of the grievance-arbitration procedure for controversies such as is here provided. The contract gave appellants remedies, both directly and through the grievance-arbitration procedure on discrimination claims. The National Labor Relations Act gives a concurrent statutory remedy for breach of the duty of fair representation. The federal courts have not created a further remedy for those who ignore those regularly available.

Respectfully submitted,

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Dated, San Francisco, February 3, 1967

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MARY C. FISHER

(Appendices Are in a Separate Volume)

No. 20719

In the

United States Court of Appeals

For the Ninth Circuit

GEORGE R. WILLIAMS, et al.,

Appellants,

vs.

PACIFIC MARITIME ASSOCIATION, a non-profit corporation, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, an incorporated association, et al.,

Appellees.

Appendices to the Brief of Appellee Pacific Maritime Association

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CONTENTS OF APPENDICES

Exhibit A

United States of America
Before the National Labor Relations Board

PACIFIC MARITIME ASSOCIATION	
and	
JOHNSON LEE, An Individual	Case No. 20-CA-2787
JAMES CAGNEY, An Individual	Case No. 20-CA-2788
WILBERT HOWARD, JR., An Individual	Case No. 20-CA-2796
ADRIAN MCPHERSON, An Individual	Case No. 20-CA-2796-2
KENNETH VIERRA, An Individual	Case No. 20-CA-2796-3
INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL NO. 10	
and	
JOHNSON LEE, An Individual	Case No. 20-CB-1121
JAMES CAGNEY, An Individual	Case No. 20-CB-1122
WILBERT HOWARD, JR., An Individual	Case No. 20-CB-1124
ADRIAN MCPHERSON, An Individual	Case No. 20-CB-1124-2
KENNETH VIERRA, An Individual	Case No. 20-CB-1124-3

DECISION AND ORDER

On May 4, 1965, Trial Examiner Herman Marx issued his Decision in the above-entitled consolidated proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondents each filed exceptions to the Trial Examiner's Decision and a brief in support thereof; the General Counsel filed cross-exceptions to the Trial Examiner's Decision and a brief in support thereof; and, each of the Respondents also filed answering briefs in response to the General Counsel's cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor

Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, cross-exceptions, briefs, and answering briefs, and the entire record in this case,[1] and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only to the extent consistent herewith.

The essential facts, as more fully set forth by the Trial Examiner, are not materially in dispute. The Respondents, acting through a Joint Port Labor Relations Committee (herein called the Port Committee), jointly maintain and operate a central dispatching hall for the hiring and dispatching of all longshoremen at the Port of San Francisco.[2]

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1. Because in our opinion the entire record, including the exceptions and briefs, adequately set forth the issues and positions of the parties, the Respondents' request for oral argument is hereby denied.

2. Pacific Coast Longshore Agreement, 1961-1966, provides, *inter alia:*

> Sec. 8.1 The hiring and dispatching of all longshoremen shall be through halls maintained and operated jointly by the [ILWU and PMA] in accordance with the provisions of Section 17 . . . . There shall be one central dispatching hall in each of the ports . . . . All expense of the dispatching halls shall be borne one-half by the local union and one-half by the Employers.
>
> Any longshoreman who is not a member of the Union shall be permitted to use the dispatching hall only if he pays his pro rata share of the expenses related [thereto] . . . . The amount of these payments and the manner of paying them shall be fixed by the [Port Committee].
>
> Sec. 17.11 The parties shall establish and maintain, during the life of this Agreement, a Joint Port Labor Relations Committee for each Port affected by this Agreement . . . . Each of said labor relations committees shall be comprised of three or more representatives designated by the Union and three or more representatives designated by the Employers . . . .

In connection therewith, the Respondents also maintain two lists of registered longshoremen at the Port, i.e., fully registered or Class A, and limited registered or Class B, longshoremen.[3]

Pursuant to applicable contract provisions,[4] and in order to meet the needs of the industry, the parties agreed early in 1963 to transfer some 400 to 450 of the approximately 530 limited registered longshoremen then on the Class B list to fully registered Class A status and to eliminate the Class B list. Implementing this decision, the Respondents jointly adopted standards to guide their selection of the most qualified men for transfer, based upon the employees' total employment record as Class B registered longshoremen. Thereafter, the Respondents notified all Class B men of the decision to effect transfers, and invited them all to apply therefor. Under the criteria thus established, some 450 men were transferred to the fully registered Class A list, and the approximately 80 men, including the Charging Parties, who failed to satisfy one or more of said standards, were deregistered.

The alleged unfair labor practices involve only one of the qualifications for transfer—the so-called "credit" or

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Sec. 17.12 The duties of the Joint Port Labor Relations Committee shall be:

To maintain and operate the dispatching hall. To exercise control of the registered lists of the port, as specified in 8.3 . . . .

3. Sec. 8.31 of the Agreement provides, *inter alia:*

The [Port Committee] . . . shall exercise control over registered lists in that port, *including the power to make additions to or subtractions from the registered lists as may be necessary.* [Emphasis supplied.]

Sec. 8.41 First preference of employment and dispatch shall be given to fully registered longshoremen . . . . A similar second preference be so given to limited registered men.

4. See footnote 4, *supra,* Sec. 8.31. Sec. 8.33 provides:

Either party may demand additions to or subtractions from the registered lists as may be necessary to meet the needs of the industry.

"late-payment" standard—adopted by the Respondents.[5] This standard, which each of the Charging Parties admittedly failed to meet, disqualified all applicants who had been late eight or more times in making their "pro-rata" payments[6] or, who had been late six or more times and had an otherwise blemished record.

In a recent case dismissing alleged Section 8(b)(2) and 8(a)(3) violations based upon a union rule restricting the rights of a class of unit employees, it was held ". . . that the true purpose or real motivation of the respondent-union, and not auxiliary side effects, constituted the test of lawfulness."[7] The principles of that decision are applicable to the facts of this case. In the instant proceeding, the "true purpose or real motivation" of the Respondent Union was meeting the industry's increasing needs for a greater number of steady, highly qualified, and responsible longshoremen by affording fully registered status to the most qualified of the limited registered longshoremen and abolishing the Class B list. To that end, the Respondents jointly promulgated guides for the selection of the best qualified employees from the lessor priority class for transfer to the greater priority class, which had the incidental or "auxiliary side effect" of causing the deregistration of those who failed to qualify for transfer.

We disagree with the Trial Examiner that the disparate enforcement of the credit standard (i.e., applying it to

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5. In view of our findings with respect to the credit standard, it is unnecessary to decide, as did the Trial Examiner, how many of the other standards, which were not alleged herein to be improper, each of the Charging Parties failed to meet. Consequently, we also find it unnecessary to consider and pass upon the merits of the Trial Examiner's "mixed motive" rationale.

6. See footnote 3, *supra*, Section 8.31 of Longshore Agreement.

7. *Shield Radio & T.V. Productions, Inc.*, 153 NLRB No. 11, at TXD p. 20, and cases cited therein.

Class B and not to Class A registered longshoremen) was unjustified by any considerations relevant to the difference in their status. The two registered lists were, in fact, established with the express purpose of creating different rights and obligations for employees in each category. As the employees' standing within the two classes differed, it is not unreasonable that this difference also be reflected in the qualifications required for registration. Nor must these qualifications be limited to physical standards, for, as in the instant case, the parties, in their broad discretion, may also require character references in order to meet their objective of selecting the most qualified of a group of employees.[8] In that connection, a person's credit standing, which reflects upon his character, may well be reasonably related to his performance as a responsible employee.

As stated in the *Shield Radio* case, it is not the Board's function to weigh the wisdom of the union's stated objective.[9] Nor is it the Board's function to substitute its judgment for that of the parties in selecting the yardstick with which to measure a longshoreman's qualifications for admission to fully registered status. The most that the Board can do in that connection is to determine, in light of all surrounding circumstances, whether the asserted objective, or the manner of its accomplishment, was pretextual. In

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8. In *Ford Motor Company v. Huffman*, 345 U.S. 330, 338, the Supreme Court stated:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

9. *Shield Radio, supra,* at TXD p. 22.

the instant case, no contention of unlawfulness was made with respect to the contract provisions authorizing the establishment and maintenance of lists of registered longshoremen and providing different rights, obligations, and penalties for the employees in each category.[10] Nor was it contended that the Respondents' decision to transfer only qualified, rather than all, Class B men to the A list, and to abolish the B list,[11] was unlawful. It was also not contended that the credit standard was discriminatorily applied among the Class B applicants who sought transfer to Class A status,[12] or that the standard was established for an ulterior or pretextual purpose of singling out the Charging Parties for deregistration. In fact, the contrary was conceded on the record, and we so find. Nor can we say that, in light of all surrounding circumstances, the credit standard is so grossly unrelated to the asserted objective as to warrant an implication of pretext.

In view of the above, we find that the Respondents, by adopting and applying the credit standard for the selection

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10. Section 17.85 of the Pacific Coast Longshore Agreement specifically provides:

> The rules and penalties provided hereinabove shall be applicable to fully registered longshoremen and, except where a more stringent rule or penalty is applicable pursuant to 17.851, to limited registered . . . longshoremen.

Section 17.851 states:

> More stringent rules and penalties than those provided hereinabove that are applicable to limited registered longshoremen . . . may be adopted . . . and, . . . that are provided in existing and future local joint working, dispatching, and registration rules and procedures or by mutually agreed practices shall be applicable.

11. We consider as immaterial the fact that the parties subsequently reestablished a list of limited registered longshoremen.

12. The Trial Examiner considered as immaterial, and unnecessary to decide, whether that standard was uniformly enforced among all Class B men. For the reasons set forth, we disagree with that conclusion.

of applicants for fully registered Class A status, did not violate Section 8(b)(1)(A) and 8(a)(1) of the Act. Accordingly, we shall dismiss the complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated, Washington, D. C. Nov. 29, 1965

JOHN H. FANNING, Member

GERALD A. BROWN, Member

SAM ZAGORIA, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

Exhibit B

JOINT COAST LABOR RELATIONS COMMITTEE

DECISION AND ORDER

Pursuant to notice duly issued, this Committee met on November 20, 1964, to hear the appeals of 44 men from a decision of the San Francisco Joint Port Labor Relations Committee at that Committee's October 19, 1964 meeting. That decision held that there was no § 13 discrimination in regard to the deregistration of these men. A copy of this decision is attached hereto as Exhibit A. The 44 men involved in this decision are:

Rhody Adams
Robert E. Birks
James Carter
Herman Crawford
Edgar Dunlap
Donald R. Durkee
Roger Fleeton
Percy Fountain
Oliver Geeter
Frank Gianninno
Ellis Graves
Eathen Gums, Jr.
Ulysses Hawkins
Fred Hayes
Mack Hebert
Conway Hudson
Willie Hurst, Jr.
Henry Imperial
Willie Jenkins, Jr.
Charles Johnson
William Jones
Melvin Kennedy
James Lankford
John Leggett
Cleo Love
Mario Luppi
Chris Makaila
Paul May
Anthony Melvin, Jr.
Willie Merritt
Donald Nau
Frank Nereu
Manuel Nereu
Willie Palmer
LeRoy Provost
Louis Richardson
Albert Roberts
Walter Robinson
Reginald Saunders
John Thylstrup, Jr.
Stanley Weir
Willie Whitehead
George Williams
Arthur Winters

At its November 20, 1964 meeting, this Committee found that an appeal had been taken under § 17.42 from the JPLRC decisions that there had been no discrimination in

violation of § 13 in the final decisions of the San Francisco JPLRC that each of the 44 men was deregistered for failure to meet the standards. This Committee received a telegram, dated October 2, 1964, from Sidney Gordon, Esq. referring to the October 19 JPLRC decision and to § 17.42, in which the word "appeal" was used. This telegram was sent to this Committee on the last day for appealing from the JPLRC decision with a direction by Mr. Gordon that it be delivered under the door, an indication to this Committee that the telegram was intended to be timely filed as an appeal from the JPLRC decision. A copy of this telegram is attached hereto as Exhibit B. This Committee in Meeting No. 27, held on October 30, 1964, concluded that it was unable to understand Mr. Gordon's October 27, 1964 telegram and ordered that he be advised that this was the case and that, if an appeal was intended, a writing should be filed with this Committee. A copy of this minute of Meeting No. 27 was mailed to Mr. Gordon. A copy of this minute is attached hereto as Exhibit C. Mr. Gordon sent another telegram dated November 5, 1964 to this Committee, supplementing his October 27, 1964 telegram, again referring to § 17.42. A copy of the November 5, 1964 telegram is attached hereto as Exhibit D. This Committee in its Meeting No. 28 held November 5, 1964 expressed some doubt as to the intent and meaning of both these telegrams but construed them as an appeal taken under § 17.42 and ordered a hearing to be held pursuant to § 17.421, on Friday, November 20, 1964. This Committee also in its Meeting No. 28 invited the parties to present written statements of position in advance of the hearing and requested that such statements be submitted on or before noon on November 19, 1964. A copy of this minute was mailed to Mr. Gordon. A copy of this minute of Meeting No. 28 is attached hereto as Exhibit E.

On November 19, 1964 this Committee received a statement of position from Pacific Maritime Association. A copy of this Statement is attached hereto as Exhibit F. This Committee, also on November 19, 1964, received a document dated November 18, 1964, from Mr. Gordon. A copy of this document is attached hereto as Exhibit G. It is possible to interpret this November 18, 1964 document from Mr. Gordon as stating that no appeal from the JPLRC decision on behalf of the men Gordon represents was being taken to this Committee. However, it clearly asks this Committee to cancel the deregistration of these men, and it is therefore equally possible to interpret it as an appeal taken to this Committee.

In any event, this Committee has jurisdiction to review the record taken before the JPLRC as to the deregistration of the above-named individuals and to determine whether their deregistration was in violation of § 13 even if there has been no appeal under § 17.42. This Committee has ultimate control over registration and deregistration of longshoremen and the procedures related thereto. In view of the serious charges made regarding the deregistration of the above-named individuals, this Committee has decided that it should look at the record to determine whether the JPLRC correctly found that there was no violation of § 13 in the deregistration of the above-named men, whether or not an appeal under § 17.42 has been made. Having looked into the record made before the JPLRC, as supplemented by the record made before this Committee on November 20, 1964, this Committee makes the following findings:

In early 1963, it was decided by the ILWU and PMA to increase the number of Class "A" longshoremen in San Francisco. Standards were established through negotiations by the parties to the end that the best Class "B" longshoremen would be advanced to Class "A" registration status.

These standards, adopted and used by the parties in determining whether a Class "B" longshoreman should be advanced to Class "A" registration, had to do with (1) the absence of major contract violations; (2) availability for work; (3) absence of substantial "chiseling" in the reporting of hours at the dispatch hall; (4) absence of repeated violation of the rules requiring monthly payment of prorata share of the cost of the operation of the dispatch hall. A summary of these standards is included as a part of Exhibit F. These standards were applied uniformly with no exceptions being made.

More than 450 Class "B" longshoremen were advanced to Class "A" registration status on the basis of having met those standards. Those Class "B" longshoremen who failed to meet the standards were deregistered. The 44 men who have appealed to this Committee were among those who were deregistered for failure to meet the standards.

Each of these 44 men and others filed an application for advancement from Limited Registration (Class B) longshore status to Full Registration (Class A) longshore status. In the application he was asked to answer questions regarding the four standards. Each of the 44 and others was thereafter given notice that he had been deregistered. Thereafter, each of the 44 and others was afforded a hearing. Each man was advised of the facts that indicated his failure or success in meeting the various standards. Each man thereafter was given an opportunity to meet with the JPLRC representatives in order to check the relevant records in detail as to any apparant failure to meet the standards. This was done before a final decision was made by the JPLRC as to his deregistration. In a few cases, not involving any of these 44 men, errors were found and the initial decision of deregistration was reversed on the basis that the review of the facts in the particular case showed

that the standards had actually been met. As to the 44 men presently under consideration, the record affirmatively shows that each of them did in fact fail to meet one or more of the standards that were established to determine who would advance to Full Registration (Class A) and that he was deregistered for this failure. Final decision on the merits of each deregistration was entered by the JPLRC sustaining the deregistration of each of the 44 and others.

Each of the 44 men involved in this appeal thereafter filed a collateral attack on the decision by a grievance asserting that there was a violation of § 13. None of these 44 men appeared at any sessions of the JPLRC hearing on the § 13 grievances. Hearings were set up for the express purpose of permitting the men who had made the allegations of discrimination to attempt to substantiate their charges. However, most of the 44 men did appear at the Unemployment Insurance hearings where they were represented by counsel and where the issues as to discrimination were litigated. At the May hearings of the JPLRC, evidence was taken and, in addition, the record taken at the Unemployment Insurance hearings was made a part of the JPLRC record. The hearings were then recessed so that a summary of the Unemployment Insurance record could be prepared. This was done. The 44 and their counsel were given the opportunity to review this summary and to present additional evidence. Thereafter further hearings were held and testimony was taken at the JPLRC hearing. The record completely rebuts every suggestion of discrimination offered by the 44 men.

At the November 20, 1964 meeting of this Committee, Cleo Love was the only one of the 44 named individuals who appeared and testified. Mr. Love was offered but rejected, the assistance of ILWU counsel to present his grievance. He

was given and availed himself of the opportunity to state his position fully. Mr. Love admitted that he had failed to meet the standards and rather addressed himself to a challenge of the standards themselves.

The only issue before this Committee at this time is whether the deregistration of the 44 men who have appealed to this Committee was violative of § 13 of the Pacific Coast Longshore Agreement. The record shows that the standards were applied equally to all *B* longshoremen. There is no evidence that any individual was advanced to Class "A" registration status who had failed to meet any of the standards that had been established by the parties for such advancement. Additionally, the record is clear that each of the 44 grievors failed to meet one or more of those standards. It is this Committee's finding, therefore, that the record does not support the allegations of discrimination which have been made. Consequently—pursuant to § 17.421 and on the basis of the entire record, including the record taken before the JPLRC and the record taken before this Committee on November 20, 1964—it is the decision of this Committee to confirm the JPLRC's decision made at its October 19, 1964 meeting that there was no § 13 discrimination involved in the deregistration of any of the 44 men.

EXHIBIT A

Before the Joint Port Labor Relations Committee of San Francisco Acting Under the ILWU-PMA Collective Bargaining Contract with Respect to Claims of Discrimination Under Section 13 of the Pacific Coast Longshore Agreement (1961-1966)

DECISION AND ORDER

Pursuant to notice duly issued, this committee held hearings on May 26, 27 and 28 and October 8 and 9, 1964, with respect to grievances of Rhody Adams; Willie Arnold; Robert E. Birks; James Carter; Timothy Carter; Johnny

Cherry; August Costa; Herman Crawford; Edgar Dunlap; Donald R. Durkee; Roger W. Fleeton; Percy Fountain; Oliver Geeter; Frank Gianninno; Ellis E. Graves; James Green; Eathen Gums, Jr.; Ulysses Hawkins; Fred Hayes; Mack Hebert; Wilbert Howard; Conway T. Hudson; Willie Hurst, Jr.; Henry Imperial; Willie Jenkins, Jr.; Charles J. Johnson; Robert M. Johnson; Wm. Jones; Melvin Kennedy; James Lankford; John T. Leggett; Abe Lincoln; Cleo Love; Mario V. Luppi; Chris E. Makaila; Paul May; Anthony Melvin, Jr.; Willie C. Merritt; Donald L. Nau; Frank Nereu; Manuel Nereu; Ralph Newman; Willie D. Palmer; Leroy Provost; Edward Reed; Louis J. Richardson; Albert W. Roberts; Walter L. Robinson; Reginald Saunders; John J. Thylstrup, Jr.; Theo. Tolliver; Stanley Weir; Willie Whitehead; George R. Williams; Arthur G. Winters. Each grievance filed asserted that the committee committed a discriminatory action by deregistering the grievor. [The committee did not receive a grievance from Mr. Newman and makes no finding as to whether or not one was filed by him.] All but two of the grievances received stated:

> "Your committee de-registered me on June 17. On July 24, I received your letter denying my hearing appeal. In so doing you consummated an action that is discriminatory. You have not judged all the men involved by the same standards.
>
> I appeal your decision and request another hearing as stipulated, where I will prove and document this discrimination."

[The two other grievances made substantially similar claims.] Each individual grievor and his counsel (where known) was given notice of all hearings and full opportunity to present evidence and argument with respect to his allegation of discrimination. Detailed evidence was presented as

to the actions taken and the reasons therefor in the course of the deregistration of the individual grievors. The committee has considered all the evidence in the record before it.

The issue here is whether deregistration of any of the grievors was violative of Section 13 of the Pacific Coast Longshore Agreement (1961-1966). The five contentions of the grievors before the California Unemployment Insurance Appeals Board that are set forth in the committee's summary of the UIAB record are unrelated and irrelevant to the issue here.

The committee finds no evidence that the grievors, or any one or more of them, were deregistered as a result of discrimination either in favor of or against any person or persons because of membership or non-membership in the union, activity for or against the union or absence thereof, or race, creed, color, national origin, or religious or political beliefs. (It is this discrimination that is prohibited by Section 13 of the contract.) Each of the grievors was deregistered by the committee as a result of its application of the agreed standards for determining whether men should be advanced to Class "A" registration or should be deregistered. The evidence shows that the committee applied the agreed standards uniformly and fairly in determining whether applicants for Class "A" registration should be advanced or should be deregistered. Accordingly, each of the grievances is without merit and each of them is denied.

It is hereby directed that Mr. Armon Barsamian, on behalf of the committee, immediately give notice to each of the grievors of the decision of the committee set forth herein, and that he include therein the language in paragraph 17.42 of the Pacific Coast Longshore Agreement (1961-1966), which provides the right of appeal from this decision.

There is placed on the agenda for a future regular committee meeting the question of whether the committee will hear Mr. Leonard with respect to his argument that this committee should again independently determine what were the actual facts involved in the cases of Ralph Newman, James Green and Wilbert Howard.

EXHIBIT B

WESTERN UNION
TELEGRAM

647P PST OCT 27 64 OD 416 1964 OCT 27 PM 7 00
SSJ101 O SFB272 LLZ4 LLZ4 RX PD
SAN FRANCISCO CALIF 27 NFT
JOINT COAST LABOR RELATIONS COMMITTEE,
DWR UNDER DOOR IMMY
16 CALIFORNIA ST SFRAN

TO DEFENDANTS PACIFIC MARITIME ASSOCIATION, A NONPROFIT CORPORATION, AND THE INTERNATIONAL LONGSHOREMENS AND WAREHOUSEMENS UNION, A VOLUNTARY UNINCORPORATED ASSOCIATION, AND THE JOINT COAST LABOR RELATIONS COMMITTEE OF SAID DEFENDANTS, AND TO THEIR RESPECTIVE ATTORNEYS OF RECORD RICHARD ERNST AND NORMAN LEONARD WITH REFERENCE TO THE DETERMINATION OF THE LABOR RELATIONS COMMITTEE OF THE PORT OF SAN FRANCISCO DATED OCTOBER 20, 1964, AND WITH REFERENCE TO OPERATION OF SECTION 17.42 OF THE PACIFIC COAST LONGSHORE AGREEMENT IN PREMISES OF THE INSTANT CIVIL LITIGATION AND PROCEEDINGS IN CRIMINAL CONTEMPT AS TO ALL OF WHICH YOU HAVE NOTICE, APPEAL AND DEMAND IS HEREBY MADE THAT ALL OF THE DEREGISTRATION PROCEEDINGS OF THE PLAINTIFFS DONE BY SAID LABOR RELATIONS COMMITTEE BE FORTHWITH SET ASIDE AND CANCELED AS NULL AND VOID BUT ONLY AS PART OF STIPULATION HEREIN OFFERED. PLAINTIFFS TOWARD THE MITIGATION OF THEIR DAMAGES DO NOW OFFER DEFENDANTS

STIPULATION FOR ORDER OF COURT THAT PLAINTIFFS MOTION TO CANCEL AND ANNUL SAID DEREGISTRATIONS BEFORE SAID COURT BE IN ITS ENTIRETY GRANTED, AND THAT SAID ANNULMENT AND CANCELLATION BY SAID JOINT COMMITTEE BE EMBODIED AND ONLY THEREIN IN SAID OFFERED STIPULATION OR OTHER ORDER OF COURT WITHOUT PREJUDICE TO THE RIGHTS OF PLAINTIFFS UNDER SAID CIVIL AND CRIMINAL PROCEEDINGS

SIDNEY GORDON ATTORNEY FOR PLAINTIFFS 756 SOUTH BROADWAY SUITE 1425 LOS ANGELES

EXHIBIT C

Minutes of Meeting of the Coast Labor Relations Committee

Meeting No. 27

Time: October 30, 1964—2:45 P.M.

Place: 16 California Street, S.F.

Present:	*For the Union*	*For the Employers*
	Messrs. H. Bridges	Messrs. J. Paul St. Sure
	H.J. Bodine	B. H. Goodenough
	Wm. T. Ward	J. A. Robertson

The Joint Coast Labor Relations Committee has received a telegram dated October 27, 1964, from Sidney Gordon. The Committee is unable to understand it. It refers to Section 17.42 of the Pacific Coast Longshore Agreement, it is addressed to the Joint Coast Labor Relations Committee among others, and it uses the word "appeal." However, it appears to request action other than consideration of an appeal in accordance with the agreement. Thus it asks that action be taken "but only as part of stipulation herein offered." Stipulations with respect to the handling of any court litigation are the affairs of the attorneys involved in the case. This Committee will consider as a Section 17.42

appeal only one that is properly presented to it as an appeal from a decision of the Joint Port Labor Relations Committee and that asks this committee to proceed to consider an appeal in accordance with the agreement.

If the telegram of October 27, 1964, is intended as an appeal under the agreement from decisions of the Joint Port Labor Relations Committee of San Francisco of October 19, 1964, a writing should immediately be filed with the Committee stating that such an appeal has been intended. The nature of the appeal intended and the reasons therefor should be set forth. The persons on whose behalf it is presented should be named.

As the time for filing an appeal with the Committee from a decision of the Joint Port Labor Relations Committee is seven days from the issuance of the Joint Port Labor Relations Committee decision and as it is not clear whether there has been any appeal, statement of intent to appeal and the other material called for herein may be filed with the Joint Coast Labor Relations Committee on or before seven days from the date hereof. Should such statement of intent and additional information not be received within the time specified herein, this Committee will conclude that no appeal from the decision of the San Francisco Joint Port Labor Relations Committee dated October 19, 1964, was intended to have been filed or was filed by the October 27, 1964, telegram.

A copy of these minutes shall be sent to Mr. Gordon as notice of this action.

Adjourned at 3:00 p.m.

Dated: 11/2/64
For the Union
/s/ Harry Bridges
/s/ Wm. T. Ward

Dated: 10/30/64
For the Employers
/s/ J. A. Robertson

EXHIBIT D

WESTERN UNION
TELEGRAM

1964 NOV 6 AM 9 12

0A024 NSA077 0A108
L LLC156 NL PD 2 EXTRA—
LOS ANGELES CALIF NOV 5—
COAST LABOR RELATIONS COMMITTEE—
16 CALIFORNIA ST SFRAN—

PLEASE BE ADVISED THAT MY TELEGRAM SUBJECT OF YOUR COMMUNICATION RECEIVED OCTOBER 31 1964 IN THE CIRCUMSTANCES OF FEDERAL CIVIL CASE 42284 PRESERVES ALL RIGHTS OF MY CLIENTS WHO ARE THE PLAINTIFFS IN SAID ACTION AND OF WHOSE IDENTITY YOU HAVE FULL NOTICE AND ON WHOSE BEHALF MY TELEGRAM PURSUANT TO SECTION 17.42 PROCEEDS ON THE BASIS THAT THE COURT NOW HAS PLENARY JURISDICTION OF THE SUBJECT MATTER OF ANY PROCEEDINGS BY YOU RESPECTING MY CLIENTS, AND THAT AS TO GROUNDS THAT MY CLIENTS WERE DISCRIMINATED AGAINST AMONG OTHER DISCRIMINATIONS BY REASON THAT THE "JPLRC" VILATED THE DUE PROCESSES OF THE CONTRACT AND VIOLATED DUE PROCESS OF LAW AND THAT YOU HAVE NO JURISDICTION EXCEPT TO BE BOUND BY AND JOINED WITH THE STIPULATION OFFERED OR BY OTHER ORDER OF COURT—

SIDNEY GORDON ATTORNEY FOR PLAINTIFFS CASE 42284—

EXHIBIT E

Minutes of Meeting of the Coast Labor Relations Committee

Meeting No. 28

Time: November 5, 1964—2:00 P.M.

Place: 16 California Street, S.F.

Present:	*For the Union*	*For the Employers*
	Messrs. Bridges	Messrs. Mork
	Ward	Jones
		Sieck
		Goodenough
		Robertson
		O'Shea
		Richardson
		Barsamian

* * * * * * *

6—DISCRIMINATION GRIEVANCES OF 44 SAN FRANCISCO MEN:

The Committee has today received a telegram dated November 5, 1964, from Sidney Gordon supplementing the one dated October 27, 1964. While it has some doubt as to the intent and meaning of these telegrams, the Committee now construes these telegrams as an appeal taken under Section 17.42. Accordingly, the Committee has determined that a hearing should be held pursuant to Section 17.421. The hearing will be held in Room 811, 16 California Street, beginning at 10:00 a.m. on Friday, November 20, 1964.

The Committee invites the parties to present written statements of position or briefs in advance of the hearing to aid the Committee in its decision. Any such statements or briefs should be submitted at 16 California Street, San Francisco, on or before noon on November 19, 1964, with a copy being furnished to counsel for the other parties.

* * * * * * *

Meeting adjourned at 4:45 P.M.

Signed: 12/1/64
For the Union
/s/ Wm. T. Ward
/s/ Harry Bridges

Signed: 11/30/64
For the Employers
/s/ J. A. Robertson

EXHIBIT F

Statement of Position of Pacific Maritime Association to the Joint Coast Labor Relations Committee Re 44 Grievors Charging Violation of Section 13.

BACKGROUND

Grievors were probationary longshoremen in the San Francisco area employed under the collective bargaining agreement between Pacific Maritime Association (PMA) and International Longshoremen's and Warehousmen's Union (ILWU). They were among a group of 743 probationary men given Class "B" seniority status in the summer of 1959. This group had been reduced to 561 by approximately February 1, 1963, at which time it was decided to advance Class "B" longshoremen who met certain standards to full registration with Class "A" seniority. During the spring of 1963, PMA and ILWU found that 467 of the 561 met the standards therefor and were so advanced. The grievors who have appealed their cases to the Joint Coast Labor Relations Committee (JCLRC) are 44 of the remaining 94 probationary longshoremen who failed to meet those standards and who were deregistered for this reason during the first half of 1963.

The contract seniority provisions called for review of the entire employment record of the Class "B" men in determining which of them would be advanced to full registration with Class "A" seniority status. The committee

gathered relevant facts and each record was judged on uniform standards. These standards denied advancement to any Class "B" seniority man (1) who had committed major contract violations, (2) who had been absent from work too often, (3) who had made substantial errors in his own favor in the honor system through which work was distributed at the dispatch hall, or (4) who had frequently violated the employment rules requiring each registered man to pay monthly his pro rata share of the employes' cost of the dispatch hall, etc. These standards were applied uniformly and no exceptions were made.

Each of the grievors filed a grievance after he was notified that he had not met the standards to be advanced to Class "A" seniority. In each case, after hearing, a final decision was entered in the grievance-arbitration procedure, holding that the facts were that the grievor had not met the standards. The collective bargaining contract permits a collateral attack on such a decision by a further § 13 discrimination grievance before the Joint Port Labor Relations Committee (JPLRC).

Each grievor filed a § 13 grievance. The discrimination issues were thereafter litigated in detail before the unemployment insurance referee. This record was made a part of the JPLRC record. Full opportunity to supplement or contradict this record was given all grievors. The record shows that the standards applied, which are set out in the attached "Summary of Standards," were properly adopted, are simple and clear, and were uniformly applied by the JPLRC. The decision of the JPLRC held there was no § 13 discrimination involved and gave notice to each of the grievors of his right of appeal to the JCLRC.

The JCLRC has construed two telegrams from Mr. Sidney Gordon, Esq., as an appeal taken under Section

17.42 of the Pacific Coast Longshore Agreement (1961-1966) on behalf of the individual grievors who are represented by Mr. Gordon. The names of those individuals are as follows, together with an itemization of specific facts before the local committee.

	Grievors	Facts
1.	Rhody Adams	3 late pro-rata payments, 44 ½ hours LMO violation.
2.	Robert E. Birks	12 late pro-rata payments, 9 hours LMO violation, 1 probation—poor availability.
3.	James U. Carter	13 late pro-rata payments, 7-½ hours LMO violations.
4.	Herman Crawford	10 late pro-rata payments, 7 hours LMO violation, 1 probation—poor availability, 1 reprimand.
5.	Edgar J. Dunlap	12 late pro-rata payments.
6.	Donald R. Durkee	10 late pro-rata payments, 1 15-day suspension—walked off job. 1 30-day suspension—walked off job. 1 30-day suspension—Intoxication.
7.	Roger W. Fleeton	1 reprimand—refused to work as directed. 25 hours LMO violation.
8.	Percy Fountain	42-½ hours LMO violation.
9.	Oliver Geeter	9 late pro-rata payments, 8 rule 3's LMO violation, 1 30-day suspension—refused to work as directed.
10.	Frank Gianninno	10 late pro-rata payments, 16 hours LMO violations, 1 reprimand—refused to work as directed.

	Grievors	Facts
11.	Ellis E. Graves	4 late pro-rata payments 1 30-day suspension—intoxication.
12.	Eathen Gums, Jr.	10 late pro-rata payments, 1 probation—poor availability.
13.	Ulysses Hawkins	9 late pro-rata payments.
14.	Fred Hayes	5 late pro-rata payments, 18 hours LMO violation.
15.	Mack Hebert	3 late pro-rata payments, 18 hours LMO violations, 7 rule 3's LMO 1 reprimand—Refused to work as directed.
16.	Conway T. Hudson	14 late pro-rata payments, 9 hours and 10 rule 3's LMO violations, 1 probation—poor availability.
17.	Willie J. Hurst, Jr.	4 late pro-rata payments, 1 probation—poor availability, 1 15 day suspension—Refused to work as directed. 1 30-day suspension—Intoxication.
18.	Henry E. Imperial	16 late pro-rata payments, 6 ½ hours LMO violation, 1 probation—poor availability.
19.	Willie Jenkins, Jr.	16 late pro-rata payments, 1 hour LMO violation, 1 probation—poor availability.
20.	Charles J. Johnson	12 late pro-rata payments, 14 hours and 15 rule 3's LMO violations, 1 reprimand—Walked off job.
21.	William Jones	15 late pro-rata payments.
22.	Melvin Kennedy	9 late pro-rata payments, 32 ½ hours LMO violation

	Grievors	Facts
23.	James W. Lankford	2 late pro-rata payments, 34 ½ hours LMO violation.
24.	John T. Leggett	15 late pro-rata payments, 4 hours and 15 rule 3's LMO violations. 1 probation—poor availability.
25.	Cleo Love	12 late pro-rata payments, 8 hours LMO violation, 2 rule 3's LMO.
26.	Mario V. Luppi	10 late pro-rata payments, 7 hours and 3 rule 3's LMO violations.
27.	Chris E. Makaila	7 rule 3's LMO violation, 1 probation—poor availability, 1 30-day suspension—Intoxication.
28.	Paul May	7 late pro-rata payments, 1 15-day suspension—Refusal to work as directed. 1 30-day suspension—Intoxication.
29.	Anthony Melvin, Jr.	12 hours LMO violation.
30.	Willie C. Merritt	29 late pro-rata payments.
31.	Donald L. Nau	4 late pro-rata payments, 28 hours LMO violation.
32.	Frank Nereu	3 late pro-rata payments, 26 hours LMO violation
33.	Manuel Nereu, Jr.	50 hours LMO violations.
34.	Willie D. Palmer	9 late pro-rata payments, 5-½ hours and 10 rule 3's LMO violations.
35.	LeRoy J. Provost	3 late pro-rata payments, 22 hours LMO violation.
36.	Louis J. Richardson	16 late pro-rata payments, 3-½ hours and 7 rule 3's LMO violations, 1 7-day suspension—Refusing to work as directed.

	Grievors	Facts
37.	Albert W. Roberts	12 late pro-rata payments, 15-½ hours LMO violation, 1 probation—poor availability, 1 7-day suspension—Walked off job.
38.	Walter L. Robinson	27-½ hours LMO violation, 1 late pro-rata payment.
39.	Reginald W. Saunders	20 late pro-rata payments, 1-½ hours LMO violation.
40.	John J. Thylstrup, Jr.	1 late pro-rata payment, 13-¾ hours LMO violation 8 rule 3's LMO
41.	Stanley L. Weir	22-½ hours LMO violation.
42.	Willie J. Whitehead	9 late pro-rata payments, 23-¼ hours LMO violation, 1 probation—poor availability, 1 reprimand—unauthorized and extended relief.
43.	George R. Williams	44 hours LMO violation, 4 late pro-rata payments.
44.	Arthur G. Winters	12 late pro-rata payments, 4-½ hours LMO violation.

These facts before the committee show that each of the 44 failed to meet one or more of the standards.

ISSUE

The sole issue before the JCLRC in this matter is whether or not Section 13 was violated in the deregistration of the grievors who have appealed their grievances to the JCLRC. Section 13 reads as follows:

> "There shall be no discrimination in connection with any action subject to the terms of this Agreement either in favor of or against any person because of membership or nonmembership in the Union, activity

for or against the Union or absence thereof, or race, creed, color, national origin or religious or political beliefs."

ARGUMENT

This appeal is from the decision and order of the JPLRC denying the above individuals' § 13 discrimination grievances as being without merit. The crucial language of the JPLRC reads:

> "The committee finds no evidence that the grievors or any one or more of them were deregistered as a result of discrimination either in favor of or against any person or persons because of membership or nonmembership in the Union, activity for or against the Union or absence thereof, or race, creed, color, origin, national or political beliefs (it is this discrimination that is prohibited by Section 13 of the Agreement)."

The JPLRC found that each of the grievors was deregistered as a result of the application of the standards agreed upon by the parties for determining whether men should be advanced to Class "A" registration or deregistered. It also found that these standards were applied uniformly and fairly in determining whether applicants for Class "A" registration should be advanced or should be deregistered.

It is the position of PMA that the decision and order of the JPLRC is not only appropriate, it is the only possible decision the JPLRC could have reached upon the evidence presented to it. To determine whether an individual should have been deregistered or advanced to Class "A" status, one has only to look at the standards used and to correlate those standards with the records of the individuals involved. This correlation clearly establishes that each of the grievors in this case failed to meet one or more of the standards and it was for that reason and that reason alone that each of them was deregistered. Furthermore, there is no evi-

dence that any individual who was advanced to Class "A" status had failed to meet any of these standards. Thus, it is clear that there was no discrimination in the application of the standards to the records of any of the 561 individuals who were either promoted to Class "A" status or deregistered.

It is to be noted that not one of the above-named individuals who has appealed to the JCLRC made an appearance before the JPLRC to attempt to establish discrimination within the meaning of Section 13 of the Agreement. Each had been given a full opportunity to do so during the unemployment insurance hearings, which consumed most of the time between the filing of the charges of discrimination and the opening of formal hearings before the local committee itself. The extensive record taken before the Unemployment Insurance Appeals Board by all, or almost all, of these grievors was incorporated in the committee's record and then summarized by the committee. This summary was made available to each of the grievors so that he could meet or supplement or amend this evidence. In addition, the testimony at the JPLRC hearing fully refutes all allegations of discrimination made in the record before the Unemployment Insurance Appeals Board. This testimony that no discrimination within the meaning of Section 13 of the Pacific Coast Longshore Agreement existed or was practiced in the deregistration of any of the individuals who was deregistered from his "B" registration status stands unchallenged in the record before the JPLRC.

CONCLUSION

The parties established standards to determine who should be advanced to Class "A" registration status and who should be deregistered. These standards were applied

to the grievors in this case as well as to all others. The application of these standards to these grievors resulted in their deregistration because they had failed to meet them. These facts not only constitute a complete negation of discrimination, they fully support the fact of non-discrimination. Consequently, we submit that the JCLRC must reject the appeals of the above-named individuals as being completely devoid of merit.

SUMMARY OF STANDARDS

The following is a summary of the standards adopted and used by the Joint Port Labor Relations Committee in determining whether Class "B" longshoremen should be advanced to Class "A" registration:

1. Any Class "B" longshoremen found to have 10 or more hours of Low Man Out violations shall be considered ineligible for advancement to Class "A" registration.

2. Any Class "B" longshoreman found to have been late in the payment of his pro-rata eight or more times (or six or more times with an otherwise blemished record) shall be considered ineligible for advancement to Class "A" registration.

3. Any Class "B" longshoreman found to have failed to meet the 70% availability requirement for any 30-day period shall be considered ineligible for advancement to Class "A" registration.

4. Any Class "B" longshoreman who has been the subject of one or more employer complaints for intoxication or pilferage that the Joint Port Committee has sustained shall be considered ineligible for advancement to Class "A" registration.

5. The standards shall be applied uniformly and no exceptions shall be made.

EXHIBIT G

Sidney Gordon [Letterhead]

November 18, 1964

Richard Ernst, Esq.
16 California Street
San Francisco, California
Norman Leonard, Esq.
240 Montgomery Street
San Francisco, California

Gentlemen:

The within is in response to your communication to my clients dated November 5, 1964, entitled "Meeting No. 28." You construe my telegrams of October 27, 1964 and November 5, 1964 as an appeal taken under Section 17.42. Be again advised, however, that the communications are, specifically, an offer of Stipulation in the subject Action Number 42284, and with the grounds and basis spelled out in the subject telegrams.

The communications by me grow out of the fact that the Coast Labor Relations Committee, which is an instrumentality of the defendants sued herein, and which is comprised, in part, of those defendants sued as individuals in said Action, has, I am sure, upon the knowledge and corresponding advice of its Attorneys of Record, purported to hold itself open to entertain a consideration, which should be binding upon it in the subject Action, of the position of my clients relative to the matter of their deregistrations.

In response, therefore, Stipulation was proferred through counsel for defendants, copy to said Committee, intended to mitigate the damages of my clients by defendants in the subject Action.

That offer of Stipulation was for the forthwith entry by the Court of the Order prayed in that Motion filed by plaintiffs for annulment of their deregistrations.

This Stipulation has not been accepted. Instead, two communications, one from counsel for Pacific Maritime Association, and another, dated October 30, 1964, affect "not to understand." Finally, as shown by the Minutes of the Joint Committee dated November 5, 1964, the Committee now undertakes to consider the cases of my clients.

However, the following circumstances obtain:

First. My clients were deregistered while in violation of no published rule which constitutes cause for deregistration.

Second. My clients received "hearings" following the 1963 deregistrations under provisions of the 1958 Memorandum which are void for want of due process, as is more particularly set forth in the complaints filed by plaintiffs in the subject Action.

Third. My clients, in that the same could not be done in light of the fact that they were guilty of no cause for deregistration, were never furnished written particulars of any such cause as required by said Memorandum, and have never been so furnished said particulars either during or following their "hearings" in July of 1963, and the failure to present the same, causes their "deregistrations" and all of the proceedings held by the Joint Port Labor Relations Committee with respect thereto, to be invalid.

Fourth. It is an implied-in-fact condition of the collective bargaining agreement, and of the rules thereunder, that appeal shall be granted within a reasonable time. I am sure that counsel, as well as their clients on the Coast Committee, are familiar with the axiom that Justice Delayed is Justice Denied.

Fifth. The delay of any hearing on the appeals dated July 27, 1963, until following commencement of the instant Action, and until May 26, 1964, almost one year later, on each of said grounds, outsted the Joint Port Labor Relations Committee of any jurisdiction it otherwise might have had. Further, said May, 1964 "hearings" proceeded in criminal contempt of Court.* The Coast Labor Relations Committee, therefore, has no jurisdiction except to act, as part of Stipulation in the within Action, to mitigate damages by binding defendants through their Attorneys of Record, to the Stipulation offered, or proceeding under other Order of Court.

Sixth. The Joint Committee is composed of parties defendant, who are possessed of a personal and pecuniary interest, adverse to that of my clients, and, on the ground of bias, is disqualified from doing other than joining in

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*The references in the above communication to some claim of criminal contempt of court is a reference to papers filed in federal court by Mr. Gordon for appellants and other plaintiffs. These proceedings are not outlined in footnote 8 to the body of this brief. When the May, 1964 grievance hearings were in progress, appellants' attorney obtained an ex parte temporary restraining order from Judge Burke without satisfying local court rules. The grievance hearings were continued to permit an appearance before Judge Burke. At this time PMA sought to have the order set aside so that the grievance hearings could continue. Counsel explained to Judge Burke what was taking place in the grievance hearings. Judge Burke stated on the record in the hearing that the actual proceedings followed were not in violation of his order, and on this ground suggested that PMA postpone, until the return date on his order, its motion to set it aside. This suggestion was accepted. When the matter came regularly on for hearing it was set before Judge Wollenberg. He refused to continue the order in effect.

Thereafter, appellants sought to litigate a claim of criminal contempt in *United States of America ex rel. George R. Williams, et al. v. Pacific Maritime Association, et al.*, Cr. Misc. 9085. When no relief was obtained in the district court, appellants filed a notice of appeal to the United States Supreme Court. As is to be expected in the events summarized above, the claim of contempt of court has never been given any cognizance.

Stipulation to cancel said deregistrations, or barring itself as a body in the matter.

Seventh. The deregistrations of plaintiffs, according to the testimony of John Trupp at the Unemployment Hearings, SF Case No. 3033, of which defendants, as the moving actors, are aware, as matters within their peculiar knowledge, proceeded through the Joint Port Labor Relations Committee under oral fiat of said Coast Committee, and said Coast Committee, as persons who have manifested a fixed and predetermined intent to accomplish and uphold the deregistrations of my clients, are, by reason of their intent, without jurisdiction to do otherwise than to mitigate damages against them through proper joinder with the Stipulation offered.

Eighth. My clients are not obliged, subsequent to the commencement of the instant Action, to be remitted to those internal remedies which, even in form, should have been available within a reasonable time, as is above set forth at Point Fourth, further, in that the proceedings, so-called of the Joint Port Labor Relations Committee were, on the grounds which have above been shown, utterly invalid, and the jurisdiction of the Coast Committee under the contract is purely appellate, it is without any jurisdiction of the grievances involved, under the present facts, except to determine its own want of jurisdiction, as part of the Stipulation offered, and through its Attorneys of Record, and in the process of that want of jurisdiction on its part, so determined, to, accordingly, have striken the said deregistrations, and all of the acts pursuant thereto, sought to be effected by the Joint Port Labor Relations Committee.

All of the foregoing matters, including all matters which were adduced by the evidence at the Unemployment Hearings and upon which, the Joint Port Labor Relations Com-

mittee affected to finally set "hearings" in May of 1964, following commencement of the instant Action, are matters which have been, since the outset, the special and peculiar knowledge of the Coast Committee itself, and any purported present, and late, consideration of the "merits" is, it is the position of plaintiffs, a sham and a fraud, and substantiates the claims of plaintiffs in the instant Action that the appellate processes of the contract, as to limited registration longshoremen, are coercively and discriminatorily applied, toward illegal objects, in violation of said contract, in concert between defendants Pacific Maritime Association and the individual defendants therein sued.

Accordingly, in the premises of the plenary present jurisdiction of the Court, and the want of jurisdiction on the part of said Joint Coast Committee, upon the communication that it would, in accordance with said agreement, act to bind itself following the last, invalid action of the Joint Port Labor Relations Committee, the subject Stipulation was proferred to enable said Committee to function to mitigate its damages by convening pursuant to Section 17.42 of the agreement, and at the same time binding itself, through its Attorneys of Record to Order for the forthwith cancellation of the deregistrations of plaintiffs.

The forthwith said cancellation by communications of its Attorneys of Record and the joining therewith in said Stipulation by defendants, precedent to obtain said binding Order of Court, is the only business with respect to this part of the subject matter of the said Action, which the said Coast Committee, in the circumstances, has any jurisdiction whatsoever to transact, and this letter constitutes nothing other than demand that the same be done forthwith.

Plaintiffs are entitled to immediate cancellation of said deregistrations and in the event that the Stipulation offered is not forthwith accepted, the said Motion before the Court will be reset, so that, in no event, are plaintiffs going to be delayed, by any purported "deliberations" on the part of the said Committee, which has for itself to take but the one said avenue of the offered Stipulation or other Court Order.

Very truly yours,

SIDNEY GORDON

Sidney Gordon

SG/rs

cc: Joint Coast Labor Relations Committee
16 California Street
San Francisco, California

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE R. WILLIAMS, et al., Appellants, vs. PACIFIC MARITIME ASSOCIATION, a nonprofit corporation, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, an incorporated association, et al., Appellees.	No. 20719

SUPPLEMENTAL BRIEF

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May 4, 1967

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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SUPPLEMENTAL BRIEF

Pursuant to leave heretofore granted, appellees file this supplemental brief in which we shall analyze Vaca v. Sipes, ____ U.S. ____, 17 L.ed 2d 842 (1967) in the light of the factual background out of which this case arose and the bases upon which the court below granted summary judgment.

1. The employe in Vaca claimed: (a) the union breached its duty to represent fairly the employe's interests in the grievance-arbitration proceedings, (b) this breach of duty precluded his getting an administrative remedy for what everyone conceded to be a contract violation, and (c) the jurisdiction of the courts to provide a remedy under §301 for such a violation should not be frustrated in these circumstances.

In Vaca v. Sipes, there was no disagreement in the Supreme Court that the employer, by discharging the plaintiff-employe, violated the terms of the collective bargaining contract then in effect and covering his work. The case arose as follows: the plaintiff-employee "alleged that he had been discharged from his employment . . . in violation of the collective bargaining agreement then in force . . ." (17 L.ed 2d at 848). At the request of the employe, the union processed the grievance into the fourth step of a five-step grievance procedure. However, at that point, over the employe's objections, the union's executive board determined that it would not submit the issue into the fifth step of arbitration. The employe filed a suit against his union for violating its duty to represent him fairly in the grievance proceedings related to that alleged breach of the collective bargaining contract.[1/]

The jury verdict for the employe was set aside on the ground that the subject matter of the suit was within the exclusive jurisdiction of the National Labor Relations Board under the rule of San Diego Building

1/ He also filed a suit against the employer for discharging him in violation of the collective bargaining contract. This suit was still in a pre-trial stage when the Vaca opinion was rendered (____ U.S. ____, 17 L.ed 2d 849, fn.4).

Trades Council v. Garmon, 359 U. S. 239 (1959). The Supreme Court of Missouri reversed. It held that there was no pre-emption by the Labor Board, that the defense of failure to exhaust contractual remedies was inappropriate on the facts of the Vaca case, and that the evidence supported the verdict.

The United States Supreme Court granted certiorari and reversed. As to pre-emption regarding the §301 issues and facts before it, the majority opinion agrees with the Missouri Supreme Court . It reverses on the ground that the defense of failure to exhaust the contract's grievance-arbitration procedure was sound because a breach of the duty of fair representation in the union's handling of the grievance was not shown.

The Vaca holding on pre-emption is not all-encompassing. First, it is limited to contract violation cases. Only such cases are within §301 court jurisdiction. The Vaca opinion gives no support to a contention that a charge of breach of the duty of fair representation by the union, unrelated to any underlying breach of contract by the employer, is sufficient to confer §301 jurisdiction. Second, Vaca is limited to cases where the union, in handling the employe's grievance, breached its duty of fair representation and so wrongfully prevented the employe from exhausting the contractual remedies.

The following excerpts, in sequence, from the opinion show how the Court itself characterized the case in reaching its result (17 L.ed 2d 854-857):

"There are . . . some intensely practical considerations which . . . emerge from the intricate relationship between the duty

of fair representation and the enforcement of collective bargaining contracts. For the fact is that the question of whether a union has breached its duty of fair representation will in many cases be a critical issue in a suit under LMRA §301 charging an employer with a breach of contract. . . . Under this section, courts have jurisdiction over suits to enforce collective bargaining agreements even though the conduct of the employer which is challenged as a breach of contract is also arguably an unfair labor practice within the jurisdiction of the NLRB.
* * *

"If an employee is discharged without cause in violation of such an agreement, that the employer's conduct may be an unfair labor practice does not preclude a suit by the union against the employer to compel arbitration of the employee's grievance * * *

"However, if the wrongfully discharged employee himself resorts to the courts before the grievance procedures have been fully exhausted, the employer may well defend on the ground that the exclusive remedies provided by such a contract have not been exhausted. Since the employee's claim is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced. . . . The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures. * * *

". . . [T]he employee may seek judicial enforcement of his contractual rights . . . if, as is true here, the union has sole power under the contract to invoke the higher stages of the grievance procedure, and if, as is alleged here, the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's wrongful refusal to process the grievance. * * *

". . . [T]he wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance. . . . The employee's suit against the employer, however, remains a §301 suit, and the jurisdiction of the courts is no more destroyed by the fact that the employee, as part and parcel of his §301 action, finds it necessary to prove an unfair labor practice by the union, than it is by the fact that the suit may involve an unfair labor practice by the employer himself. . . . And if, to facilitate his case, the employee joins the union as a defendant, the situation is not substantially changed. The action is still a §301 suit * * *

"For the above reasons, it is obvious that the courts will be compelled to pass upon whether there has been a breach of the duty of fair representation in the context of many §301 breach-of-contract actions. If a breach of duty by the union and a breach of contract by the employer are proven, the court must fashion an appropriate remedy. * * *

"It follows from the above that the Missouri courts had jurisdiction in this case. . . . But the unique role played by the duty of fair representation doctrine in the scheme of federal labor laws, and its important relationship to the judicial enforcement of collective bargaining agreements in the context presented here, render the Garmon preemption doctrine inapplicable."

The opinion in Vaca in no sense holds that §301 opens the courts to litigation of every employe's grievance. Intact, is the court's traditional recognition of the vital position of the contract grievance procedure as the heart of successful labor relations (17 L. ed 2d at 854, 858). Intact, is the court's recognition that the courts cannot resolve every grievance of every dissatisfied employe. Intact, although not relevant in the instant appeal is the principle that the union must be free to weed out the bad from the good grievances and in good faith weigh the interests of the entire bargaining unit in administering the contract (859-860). Intact, is the union's broad discretion in negotiating and amending the contract. Intact, is the principle that the collective bargaining system "of necessity subordinates the interest of the individual employee to the collective interests of all employees in a bargaining unit" (853). The courts are open to hear an employe's attack on a decision in the grievance machinery only if he can show 1) that his union breached the duty of fair representation in handling his claim through the grievance machinery, and 2) this breach precluded him from obtaining an arbitration award.

2. The appellants in this case were deregistered and went into court without exhausting the contract grievance machinery available to them.

This appeal involves the status of 51 men who worked for employers affiliated with Pacific Maritime Association.

In 1959, 742 men, including appellants, were registered as Class B longshoremen under the collective bargaining contract between PMA and ILWU. Thereafter, the parties to that contract engaged in negotiations with respect to the mechanization of the industry and the procedures under which there could be a reduction in the manhours necessary to handle any particular amount of cargo. At the same time they negotiated an agreement to cushion the adverse effects of such mechanization upon the employes. In this background, the parties imposed a freeze on registration so that they might study the effects of this collective bargaining. During the period of the freeze, which continued from shortly after the B men were registered in 1959 until the spring of 1963, there was gradual attrition among the total number of B men in San Francisco. Thus, by early spring of 1963, the number of B men was reduced to 564.

Early in 1963, the matter of increasing the number of men on the registered list and moving some of the B men to A status was agreed upon. It was determined that the B men in San Francisco would be reviewed with respect to their past performance on the job, those who had met the standards agreed to would be advanced to A and

those who did not meet these standards would be eliminated and other men would be employed to take their place. This procedure was well known among the longshoremen as indicated by a letter that Stanley Weir, one of the appellants, sent to the President of Local 10. "Dear Brother Kearny: I am writing this letter to ask for your help in clearing my name. At last night's Local 10 meeting the International President, Harry Bridges, made it very clear that the Local's investigating committee has rejected the men it considered chisellers, dues delinquents and contract violators. I cannot disagree, but the committee can make mistakes as was pointed out in the meeting." (R. 297). Four hundred sixty seven men who met the standards were advanced to A status. Ninety seven men (including appellants) who did not meet the standards were deregistered.

Prior to this action, the men all filed written applications to advance to A and were given a written notice of whether they would advance or not advance. Those whom the Committee determined to eliminate in the first review of the facts were given an opportunity to face the joint committee and hear an oral statement of the facts involved; they were given a further opportunity to go over the detailed facts with the men maintaining the records and record books that were involved (R. 89). Thereafter, decisions were made on this investigation and hearing. In some cases, after a review of the facts, the joint committee reversed its prior decision. None of appellants was in this category, however (R. 89-90). The joint committee gave notice of its decisions and of applicable grievance

procedure to the affected men, including appellants (R. 89, 91a - 91c). All of the appellants filed grievances saying:

> "Your committee de-registered me on June 17. On July 24, I received your letter denying my hearing appeal. In so doing you consummated an action that is discriminatory. You have not judged all of the men involved by the same standards.
>
> "I appeal your decision and request another hearing as stipulated, where I will prove and document this discrimination." (R. 2, 4L)

Appellants thereafter carried these grievances up through a decision by the Joint Coast Labor Relations Committee. A summary of the record as to the actions of the employers, the unions, the appellants and the other four Class B men who were deregistered during this period are set out in Appendix B. This Committee upheld the decision to deregister them (R. 86-91). With a written notice of this decision each man was advised that he could appeal the matter to the arbitrator (R. 83-85). During all these steps appellants were represented by counsel and notices of all actions by the committees, including the final decision and notice of the right to appeal to the arbitrator, were given to counsel as well as to appellants themselves. Appellants chose not to exhaust the contract grievance machinery (R. 83). They thereafter took their claims to the Labor Board and the Board concluded that their claims were barred by the period of limitations (R. 176-179). Before they filed charges with the Board, another group identically situated had timely gone to the Board, which took jurisdiction and on the merits sustained the validity of the actions taken by the employers and the union. Pacific Maritime Association and International Longshoremen's and Warehousemen's Union, Local 10 [Johnson Lee], 155 NLRB 117, 60 LRRM 1483 (1965).

Appellants say that they are excused from having failed to exhaust their contract remedies because: (1) Section 13 of the contract and §17.4, etc. implementing §13 do not apply to them; and (2) that the time that elapsed between the filing of their grievances and the commencement of the hearing at the Port Committee level was too long.

(1) Section 13.1 clearly covers these claims. That section reads:

> "There shall be no discrimination in connection with any action subject to the terms of this Agreement either in favor of or against any person because of membership or nonmembership in the Union, activity for or against the Union or absence thereof, or race, creed, color, national origin or religious or political beliefs."

The nature of the claim asserted - deregistration because of opposition to the union's collective bargaining position on mechanization - clearly falls within the scope of this provision. The Weir affidavit shows that if his claim is anything, it is a claim of discrimination because of "activity . . . against the Union".*/

Appellees flatly deny any contention that there was discrimination of any sort towards Weir or towards any appellant; however, the merits of the claim need not be discussed. Appellants' forum for such a discussion is not in this Court. Their forum was arbitration. They were clearly told, both individually and through their counsel, that they could take the decision of the Joint Coast Labor Relations Committee regarding §13.1 to the arbitrator (R. 84). They chose not to do so although this was the clear and obvious contractual remedy, which

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*/ Stanley Weir was the only appellant who filed an affidavit.

federal law favors and requires. The very least that they were required to do was to attempt to go to Professor Kagel, Republic Steel Co. v. Maddox, 379 U.S. 650 (1965), Vaca v. Sipes, ___ U.S. ___, 17 L. ed 2d 842 (1967). They did not even try. If they had, and if their claims had been rejected on the theory they now espouse, they would at least have had satisfied the requirements of Maddox and Vaca. But since they failed even to make the attempt, they have no standing to maintain a §301 suit, and Judge Harris was correct in so deciding as a matter of law.*/

(2) The time involved in processing the more than 50 grievances does not excuse appellants' failure to appeal to the arbitrator. The brief that PMA filed previously sets out in detail the facts occurring during the period, starting with the decisions to review the records of the B men who had been on the job during the freeze period, continuing during the many court and administrative hearings carried on until the appellants first went to the district court, continuing thereafter during the preparation of the grievance machinery record and concluding with the appellants' decision not to go to arbitration (PMA Brief, pp. 12-16, 72-73). The time involved in handling the many grievances to develop an adequate and reasonable record with regard to these grievances was obviously necessary and reasonable in view of the complexity of the factual issues involving almost 100 dissatis-

*/ While we are confident that the courts would have to reject this contention in view of the clear language of §13.1, appellants have no right to ask the courts to make this decision.

fied men who had been deregistered. Throughout this period, the joint parties participated with appellants in all proceedings and hearings in which appellants chose to participate.

While these proceedings were going on, and during the period when the basic record with respect to the claims and counterclaims was being developed during the vigorous litigation in the unemployment insurance hearings, appellants moved into court without waiting for the grievance-arbitration machinery to move along. Neither they nor their attorney made any inquiry of the employer, the ILWU, or PMA's counsel in the unemployment insurance litigation as to the status of their grievances. Thus the court proceedings carried on while the grievance machinery was being followed, while the unemployment insurance litigation was continuing, and while the Labor Board was investigating appellants' charges and deciding the similar charges of other Class B men who were deregistered with appellants. */

There is a further complete answer to this contention. The present action is a collateral attack on the decision of the Joint Coast Labor Relations Committee. Appellants participated in the grievance procedures right up to this step. They had the chance for a final hearing before the arbitrator and voluntarily gave it up. The district judge

*/ The delay in carrying on the grievance-machinery - while all these many other proceedings involving appellants, other Class B men, the union and the employers were going on - is not a claim of repudiation of the contract by either the union or the PMA that would excuse appellants from exhausting the grievance machinery. The Vaca opinion (p. 855) indicates that "repudiation" or estoppel may be an excuse for not exhausting the grievance machinery, Drake Bakeries, Inc. v. Bakeries Workers, 370 U.S. 254, 260-263 and 6a Corbin Contract §1443 (1962). Reference to this case and the treatise indicates that the Court was talking about action that was a repudiation of the contract itself followed by a later argument that is failure to exhaust the grievance machinery precluded other action to recovery for the repudiation of the contract.

was correct in holding, as an independent ground of decision, that as a matter of law appellants were entitled to no relief because they had failed to exhaust the grievance-arbitration machinery available to them under the contract.

The doctrine requiring exhaustion of contract remedies is discussed at length in Vaca. (See 17 L. ed 2d at 854, 855, 856, 858, 859, 860.) There the employe was forced by the terms of the collective bargaining contract to rely upon the union to process the grievance for him. The Supreme Court held, in view of the fact of the union's absolute control of the grievance machinery (17 L. ed 2d at 855), and the charge that the union violated its duty of fair representation in not processing the grievance to finality, that the employe might be excused from the usual requirement of exhausting contractual remedies. Thus the Vaca holding is that the requirement of exhaustion is excused where the union has absolute control of the grievance procedure and has used that control to prevent the processing of the employe's grievance.

The requirement of exhaustion of contract remedies, as discussed in Vaca, fully supports the argument made by appellees in their earlier briefs that appellants now are barred from federal court for failure to exhaust their contract remedies. In the case at bar, where the employes were not prevented access to the grievance machinery by union action, the employe has no excuse for not exhausting his contractual remedies. Appellants were not deprived of the power to exhaust their grievance-arbitration machinery by any breach by the union of the duty of fair representation in the handling of their grievances. The grievance machinery under this contract, unlike that in Vaca, was personally available to each employe at all

times.*/ Appellants' access to it was not controlled by the union and could not be controlled by the union; no action on the part of the union was required for them to obtain a hearing before Professor Kagel.

The record shows that appellants, on advice of counsel, voluntarily chose to ignore the arbitration remedies provided under the collective bargaining contract. Appellants are therefore left to the consequences of their choice. Appellees have an absolute defense based on appellants' failure to exhaust their contract remedies. Vaca v. Sipes confirms the propriety of the district judge's ruling in this respect.

3. Appellants herein, unlike the employe in Vaca, raise no litigable issue of contract violation by the employer.

One of appellants' counts in their Fourth Amended Complaint alleges federal jurisdiction under §301 of the Labor Management Relations Act. That section reads:

> "Suits for violation of contract between an employer and a labor organization . . . may be brought in any district court of the United States."

The sine qua non of jurisdiction is a violation of a collective bargaining contract. Vaca recognizes this. Appellants recognize it and they have been hard put to define any claim of contract breach in this case.

*/ The Supreme Court opinion even recognizes - at footnote 10 with its reference to Retail Clerks v. Lion Dry Goods, Inc., 341 F.2d 715 - that not all collective bargaining contracts are similar to that in Vaca and that some, like the relevant provisions in the contract between the ILWU and the PMA, give the individual employe control of his grievance.

Appellants offer three claims of contract breach and each is manifestly without merit. They are: (1) that the standards under which they were deregistered were not reduced to writing, which is claimed to violate §22.1 of the 1961 contract; and (2) that they were deregistered even though they claimed to have met those standards because they opposed the union's mechanization agreement; and (3) that appellants raised a litigable issue in their claim made here that some of them met the 1963 standards but were nevertheless deregistered.

(1) Appellants claim they were deregistered because they were "chisellers, dues delinquents, and contract violators"*/ and that this was in breach of the contract because no formal written document, duly executed, has been produced to set out these grounds for deregistration.

Appellants' basic contract violations claim is that nothing may be done in the day-by-day administration of the collective bargaining agreement unless the parties record their actions in formal minutes or in some other neat document with signatures affixed. They refer to §22.1 of the basic contract document, the grey book, entitled "Pacific Coast Longshore Agreement" (R. 4), stating that no provision "of this Agreement" may be amended except by another written document

*/ Mr. Weir's affidavit describes appellees' action against appellants in these terms (R. 297)

executed by the parties. From this they generalize that nothing may be done in the continuing administration of the contract unless it is by written amendment of the grey book, executed by the parties. Such procedures would stultify collective bargaining. Section 22.1 of the Agreement, in no such way frustrates administration of the contract.

The grey book itself specifically recognizes that not every action taken in supplementing the contract must be done with the formality of the execution of the basic document. For instance, it specifically authorizes the sort of action utilized in adopting and applying the standards the joint committees used in reviewing Class B men to decide if they should advance to Class A. The basic document sets out a number of rules and penalties and continues with the following language:

> "17.85 The rules and penalties provided hereinabove shall be applicable to fully registered longshoremen and, except where a more stringent rule or penalty is applicable pursuant to 17.851, to limited registered longshoremen and to nonregistered longshoremen.
>
> "17.851 More stringent rules and penalties than those provided hereinabove that are applicable to limited registered longshoremen or to nonregistered longshoremen or to both such groups may be adopted or modified by unanimous action of the Joint Coast Labor Relations Committee and, subject to the control of such Committee so exercised, more stringent rules and penalties applicable to limited registered men or nonregistered men or to both groups that are provided in existing and future local joint working, dispatching, and registration rules and procedures or by mutually agreed practices shall be applicable."

The nature of this broad power to deregister limited registration (Class B) longshoremen was made expressly known to the appellants. Thus, in making his application for Class B status in 1959, such appellant expressly agreed that he understood that:

> ". . . [R]egistered longshoremen may be deregistered and . . . registration may be revoked in accordance with such agreements and such rules now in effect or hereafter to be agreed upon or adopted by the Association and the Union or their successors or by the Joint Port Labor Relations Committee." (R. 4k)

The contractual background as to the adoption and use of the 1963 standards is ignored by appellants. They assert the standards are invalid merely because they were not, at some date in time, set out in a formally executed, written document. The contract provisions quoted above are to the contrary.

In any event, appellants cannot complain that their records were judged by those less formally adopted standards. They do not and cannot make any claim that those standards were not reasonable ones. Appellants do not say that they were injured by the parties' failure to reduce the 1963 rules to a formally written document. The parties to any contract obviously have the right to ratify mutual agreements made by them; the date on which they ratify them is utterly insignificant. It is thus clear that appellants' first point raises no litigable issue and Judge Harris was correct, as a matter of law,

in granting summary judgment to appelles on this point.*/

(2) The second claim of breach of contract is that appellants were deregistered because of their opposition to the union's collective bargaining position on mechanization and its alleged ignoring of the interest of the B men. It is claimed that deregistration for these reasons constituted "discrimination".

There is no provision in the contract, save Section 13, that prohibits discrimination against longshoremen. A claim of discrimination, not related to §13, does not charge contract violation. Section 13 is the only

*/ It is also to be noted that the 1958 rules, on which appellants rely, include language that appellants ignore. Thus, the provisions setting forth the reasons under which limited registration (Class B) longshoremen may be deregistered or discharged include the following (R. 126-127):

> "§9. De-registration of Limited Registration (Class B) Longshoremen.
>
> "(a) A Class B longshoreman may be de-registered in accordance with the provisions of Section 16(f) of the Basic Longshore Agreement and, in addition, he may be de-registered for cause by the Joint Labor Relations Committee (in accordance with such rules or uniform procedures as may be established or followed by such Committee) if the Committee finds: * * *
>
> "(xi) Or for any other cause; provided that neither membership or nonmembership in the union nor activity or nonactivity for or against the union, shall be a factor in considering applications for registration or in de-registration."

portion of the contract dealing with discrimination.*/

Appellants have repeatedly disavowed any breach of §13. However, they do not, because they cannot, point to any other section of the contract that was breached by "discrimination". Therefore, the "discrimination" that they say resulted in their deregistration was not a violation of the contract. Whatever else it may have been, it is not relevant to a claim of breach of contract.

(3) Appellants now argue that a third claim of contract breach exists because they purportedly met the 1963 standards.

Appellants, through argument of counsel, now refer to the affidavit of Stanley Weir, the only affidavit that any of them submitted, and point to his conclusionary statement that he did not fail to meet

*/ The inclusion of the broad language of §13. 1 in the ILWU-PMA contract was merely part of the joint employer-union policy of insisting on non-discrimination in the industry. The policy is not a new one in Local 10 nor in the International Union. Charges of discrimination for race, for instance, could hardly be made as to Local 10 in San Francisco where an excess of 60% of the members are Negroes or are of other minority races.

the 1963 standards for registration as an A man.*/ Counsel cannot, of course, show that improper deregistration, even if it had occurred, would have been anything other than a violation of §13.1 of the Agreement, the section upon which they have repeatedly disclaimed any reliance.

In any event, the record sets forth the precise details of the failure of appellants to meet these standards. Appendix of PMA brief, pages 23-26; see also the findings of the Joint Coast Labor Relations Committee (R. 86-91). These clear factual statements have not been controverted by appellants in any affidavits. On this second point of appellants, Judge Harris was also correct in holding, as a matter of law, that "no breach of contract is or can be pleaded" (R. 501).

*/ It is to be noted that counsel's offer of proof with respect to inflating the scope of the Weir affidavit is limited to the matter of discrimination. It in no way relates to any claim of breach of contract. In the brief it is stated, "Plaintiffs' counsel made an offer of proof wherein he offered to supply evidence that the kind of discrimination that was shown againt Mr. Weir, the unfair representation, could be shown against practically everyone of the plaintiffs, if not all of them." (Opening Brief, page 17). In the transcript he admits that he has not talked to all of them (R. T. of the proceeding of August 16, 1965, 3). Their brief asserts only that this offer served to "corroborate" Weir's affidavit (Opening Brief, page 18). Parenthetically, the offer of proof is, of course, of no value to establish a litigable issue.

In any event, the nature of this offer is clear, both in the record itself (pp. 37-38) and in appellants' opening brief (pp. 17-19). The brief continues by asserting that there was hostility "concerning the B men" (which the brief in no way suggests did not apply equally to the 450 who were advanced to Class A registration) and that this was shown by the contract amendment calling for the payment of $29,000,000 "for the benefit of the Class A longshoremen" and by the unequal treatment of B men as compared to A men. It is also claimed that Mr. Weir was the individual who expressed opposition to this contract amendment. Clearly none of this raises any issue of breach of contract as to anyone. He does not raise any breach of contract after discussing the offer of proof.

4. Appellants also fail to show that Vaca is applicable because they assert a classical, routine NLRA unfair labor practice.

The Vaca opinion spells out an exception to the doctrine of pre-emption that applies only with respect to claims of a breach of the duty of fair representation that arise in handling of grievances that are later the subject matter of a §301 suit. This is the duty that has historically been enforced by the courts and has only recently been enforced through unfair labor practice proceedings before the National Labor Relations Board (17 L. ed 2d at 852-857). We submit that there is nothing in the record to show that this is the type of unfair labor practice that appellants assert. Rather the claim is that appellants were discriminated against because they were the entire group of men who attacked the union's action in agreeing to the mechanization contract. This is a classical or traditional unfair labor practice. These allegations call for exercise of the Board's unique expertise even if, as appellees deny is the case here, the unfair labor practice in some way prevents the hearing of a grievance asserting a claim of contract violation.

It is clear from Vaca that the Supreme Court was not jettisoning the Garmon-Borden-Perko doctrine of pre-emption and that it was not saying that every time an employe complains of unfair treatment he can maintain a suit under §301. In Vaca the Court reviewed the rationale for pre-emption: the need to avoid conflicting rules of substantive labor law and the desirability of leaving the development of such rules to the agency created by Congress for that purpose. While it pointed out that there were both statutory and judically-created

exceptions to pre-emption, it said that these exceptions in no way undermine the vitality of the pre-emption rule (17 L. ed 2d 852). It said that a decision to pre-empt or not to pre-empt must turn on the nature of the particular interests being asserted and the effect upon the national labor policy of concurrent judicial and administrative remedies (17 L. ed 2d 852).

The interest in Vaca that was being asserted differs from the interest asserted here. In Vaca, the interest being asserted was that the union not refuse to take a grievance to arbitration. For that particular interest the Court found no compelling reason to apply the pre-emption doctrine, for the Board had only lately begun to assert jurisdiction over that interest and, as a result, the Board had no particular expertise in that area. The interest here asserted is that the union should not participate in discharge of employes because they had engaged in anti-union conduct. This is preeminently the type of interest that the Board has protected for over thirty years against employer interference and for twenty years against union interference. The effect on the national labor policy of asserting concurrent jurisdiction in this case would be chaotic.

The Board's reports are replete with cases in which it, applying its expertise, has developed a uniform body of federal labor law dealing with discharges of employes for union or anti-union conduct. This is not an area over which the Board has asserted its jurisdiction only recently. This Court's records, as well as the records of other circuit courts and the records of the Supreme Court, are also replete with judgments enforcing such Board orders. Just last month,

this Court enforced an NLRB order against an ILWU local in Oregon in which it was charged that the Union had refused to dispatch certain employes because they had protested against the dispatching procedures. NLRB v. ILWU Local 12, _____ F. 2d _____, No. 20914, April 18, 1967.

Thus, the premise for the refusal to apply pre-emption in Vaca is absent here. On the contrary, there is here involved the very test that Vaca enunciates for the application of pre-emption: The interest asserted is clearly protectible by the National Labor Relations Act and has in fact been protected by the Board for years and years. This interest was, on the facts of this very case, considered and passed upon adversely to appellants' contentions by the Board.

5. Subsequent actions by the Supreme Court after Vaca confirm our positions.

The opinion of the Supreme Court in Vaca must be read in the perspective of the factual situation there under discussion. Actions of the Supreme Court since its ruling in Vaca, like the opinion language quoted above, impel the conclusion that the Court was addressing itself only to factual situations involving (1) a claim of violation of a collective bargaining contract subject to litigation in the contract's grievance machinery plus (2) a claim that a union arbitrarily utilized its control of the grievance machinery to deny an employe access to it.

In our earlier briefs, appellees discussed at length the case of Woody v. Sterling Aluminum Products, Inc., 365 F. 2d 448 (8 Cir. 1966). Two parts of that case dealt with typical breach of contract claims. The first part was dismissed on the basis of "deliberate stripping" of any unfair representation allegation from the pleading in one complaint (453). The second part was dismissed after a showing by plaintiff Woody's affidavit

that he, himself, had failed to act to process the grievances (455). The opinion indicates (448-455) there was no claim that the failure to exhaust should have been excused. There was no breach of the duty of fair representation by any refusal of the union to proceed with any grievance. The grievance machinery stopped while Woody was in full control of the grievance procedures.

The third part of that case dealt with the "plaintiffs' charges of the Union's bad faith in negotiating the collective bargaining agreement (456). The matters alleged in this part were accordingly held to be outside §301 jurisdiction and within the exclusive jurisdiction of the Labor Board (365 F. 2d at 456-457).

On March 14, 1967, after the ruling in Vaca, the Supreme Court denied certiorari in Woody, ___ U.S. ___, 18 L. ed 2d 105. Standing by itself that might not mean too much, but it does not stand by itself. Two other things happened.

Another petition for certiorari was before the Court at this time with respect to an Ohio state court decision in Mangus v. A.C.E. Freight, Inc., 6 Ohio App. 2d 87, 216 N.E. 2nd 639 (1966). The complaint in that case charged that plaintiff suffered damages because of the refusal of the union to process his grievance against the employer and because of the act of the employer in terminating his employment. The Ohio court, citing Local 100, etc. v. Borden, 373 U.S. 690 (1963) and International Ass'n. of Bridge, etc. Workers v. Perko, 373 U.S. 701 (1963), dismissed the complaint on pre-emption grounds. On March 27, 1967, two weeks after it denied certiorari in Woody, four weeks after

it had decided Vaca, the Supreme Court granted the petition for certiorari, vacated the judgment and remanded the case for further consideration in the light of Vaca v. Sipes (35 U.S. Law Week 3343).

It is significant that in the Ohio case, like Vaca, the claim was of a breach of the duty of fair representation in a refusal by the union to process a grievance. Thus, the remand in the Ohio case is perfectly understandable; it presented a situation like Vaca and the Court entered a Vaca type order. After this action by the Court, the petitioner in Woody asked for a rehearing and cited Vaca as the circumstances of substantial and controlling effect, as required by the Supreme Court rules, to justify the granting of a rehearing.

The Woody rehearing petition, in language strongly reminiscent of that used on the first page of appellants' reply brief, states:

> "Circumstances of substantial and controlling effect have arisen during the time that the petition for writ of certiorari herein was pending. The decision and majority opinion of this Court entered on February 27th, 1967, in the case of Vaca v. Sipes, 87 S.Ct. 903 (1967), thoroughly, favorably and affirmatively answers every question presented for determination by these petitioners. The ruling of the Eighth Circuit Court of Appeals in this case is now in direct conflict with this Court's opinion in Vaca v. Sipes (supra)."

In the face of this, on April 24, 1967, the Supreme Court denied the petition for rehearing in the Woody case (35 U.S. Law Week 3377). The history of these two cases during the nine weeks since Vaca shows that the exception to applying the doctrine of pre-emption set out in that opinion has no application to the case at bar. It is equally clear from this history that the long-standing exhaustion doctrine, discussed in

Maddox, does have application because here, unlike Vaca and Mangus, the failure to exhaust was not the result of the union's refusal to process the grievance.

Conclusion

We have analyzed the Vaca opinion and holding, as well as related recent actions of the Supreme Court. We have presented several independent grounds for sustaining the decision of the district court, grounds that remain fully supported after Vaca. The failure to exhaust the grievance machinery cannot be excused. There is no contract violation. The alleged breach of the duty of fair representation is a routine, traditional unfair labor practice. This case is a Woody case, not a Vaca case.

Respectfully submitted,

Richard Ernst

Mary C. Fisher

Dennis Daniels

Norman Leonard

May 4, 1967

San Francisco, California

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dennis T. Daniels

APPENDICES

EXHIBIT A

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 946.

JOHN WOODY
and
192 ADDITIONAL PLAINTIFFS-APPELLANTS
vs.
STERLING ALUMINUM PRODUCTS, INC.,
and
INTERNATIONAL ASSOCIATION OF MACHINISTS
and
DISTRICT NO. 9, INTERNATIONAL ASSOCIATION
OF MACHINISTS,
and
LOCAL LODGE NO. 41 OF THE INTERNATIONAL
ASSOCIATION OF MACHINISTS
and
LARRY CONNORS, DIRECTING BUSINESS REPRESENTATIVE,
DISTRICT NO. 9, I. A. OF M.,
and
RUSSELL DAVIS, BUSINESS REPRESENTATIVE,
DISTRICT NO. 9, I. A. OF M.,
Defendants-Appellees.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

The petitioners herein pray this Court to grant a rehearing of its order of March 13th, 1967, denying a writ

of certiorari, 87 S. Ct. 1026 (1967). Petitioners further pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit as prayed in their petition for certiorari.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

Circumstances of substantial and controlling effect have arisen during the time that the petition for writ of certiorari herein was pending. The decision and majority opinion of this Court entered on February 27th, 1967, in the case of Vaca v. Sipes, 87 S. Ct. 903 (1967), thoroughly, favorably and affirmatively answers every question presented for determination by these petitioners. The ruling of the Eighth Circuit Court of Appeals in this case is now in direct conflict with this Court's opinion in Vaca v. Sipes (supra).

This case was cited "CF", in the Vaca v. Sipes opinion by Justice Fortas "concurring in the result" with the majority opinion (87 S. Ct. at 921).[1] Petitioners urge the grant of rehearing in order to bring a determination of the issues raised herein into conformity with this Court's mandate in Vaca v. Sipes and thereby restore uniformity to the federal common law of labor relations.

---

[1] Petitioners have previously suggested simultaneous consideration of this case along with its companion case of Brown, et al., v. Sterling, etc., cert. den. 87 S. Ct. 1023. The Brown case was also cited "CF." in the opinion by Justice Fortas in Vaca v. Sipes, 87 S. Ct. at 922, footnote No. 3. However, the Brown citation in Vaca v. Sipes has consistently erroneously designated the Brown certiorari petition as "No. 946, O. T. 1966". The correct Brown certiorari designation is **No. 937**, O. T. 1966. A petition for rehearing in the Brown case is being filed simultaneously with this petition.

CONCLUSION.

For the reasons set forth herein and in the petition for writ of certiorari it is respectfully urged that rehearing be granted and that, upon such re-hearing, a writ of certiorari issue to the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

.....

JEROME J. DUFF,
Counsel for Petitioners.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

.....

Jerome J. Duff,
Counsel for Petitioners.

Certificate of Service.

State of Missouri, } ss.
City of St. Louis. }

I, Jerome J. Duff, of counsel for the Petitioners herein and attorney of record for the Petitioners in the Court below, depose that on the 6th day of April, 1967, I served four copies of the foregoing Petition for Rehearing on the Respondents as required by Rule 33, Paragraph 1, by personally mailing said copies hereof to Mr. William Stix, Attorney of Record for Respondent Company, 408

Pine Street, St. Louis, Missouri 63101, and Messrs. Bartley, Siegel and Bartley, Attorneys for Respondent Unions, 130 South Bemiston Avenue, Clayton, Missouri 63105.

.....

Jerome J. Duff.

Subscribed and sworn to before me at St. Louis, Missouri, on this 6th day of April, 1967.

.....

Notary Public.

My Commission Expires:

.....

EXHIBIT B

"The joint union-employer committee reviewed the records it had as to the longshore work history of the applicants on the basis of the standards set forth in the 1963 Rules. On April 24, 1963, sixteen applicants were found to have failed to satisfy the standards, and they were removed from the Class B list and deregistered. On June 17, 1963, an additional 81 men were found to have failed to satisfy the standards, and they were also deregistered. Of the Class B men who applied for fully registered (Class A) status in 1963, 467 were found to have met the standards and they were given Class A status (R. 757)."

(PMA Brief, p. 12)

"After the initial individual decisions were made on each of appellants' applications to advance to Class A status, each man was given notice and informed that he had an opportunity to appear before the Joint Port Committee. Each appellant appearing was told of the matters in issue and was permitted to respond (R. 757-758). He was also told he could have a further hearing before a sub-committee of the Joint Port Committee to review the detailed facts on which the committee had acted in refusing his application (R. 757-758). In a few cases (none involving appellants) such hearings before the sub-committee brought to light errors in the facts in the particular cases and established that the men in question had indeed met the committee's standards; they were thereupon granted Class A status (R. 89-90).

"In July 1963, when the respective decisions of the port committee to deregister each of the appellants became final, each man was informed of his right to file a grievance if he wished to attack the decision on the ground that there had been discrimination against him (R. 2). Each of the appellants herein filed a type-written grievance on July 27, 1963. . ."

(PMA Brief, pp. 13-14)

"... appellees were called upon during the ensuing period to defend unfair labor practice charges brought by five Class B men who were deregistered at the same time as appellants.[4] During the same period, hearings were conducted on a large number of unemployment insurance claims filed by appellants herein and by others. Such hearings were held on November 6, 1963, and in 1964 on January 13, 15, 17, 20, February 3, 4, 5, 6, 7, March 2, 6, 30, 31, and April 1 (R. 198). The breaks in the hearing were principally due to collateral proceedings instituted by appellants' attorney (R. 759). The decision on the claims was not rendered until May 14, 1964 (R. 212).

"The principal issue at the unemployment insurance hearings was not that of whether the man had or had not violated the standards for Class A registration but, rather, whether those violations, if any, would disqualify him for unemployment insurance under the peculiar tests set forth in the statute. The unemployment insurance issue could not be determined without a full investigation of the factual basis for the denial of full registration under the "1963 Rules". These factual questions were vigorously litigated by appellants' attorney and a full record resulted.

"The transcript of the hearings became available to the Joint Port Committee in May, 1964 (R. 475); it was incorporated into the record of the committee when grievance hearings were commenced by that committee later that month (R. 90). The committee also ordered that this record be summarized in writing and made available to each of the appellants for assistance in preparing and presenting his case in the grievance-arbitration proceedings. (R. 91v). "

"4. The charges to which we refer were filed by the men on July 25, August 5, September 26, and December 2, 1963. After a field investigation, a complaint was issued by the San Francisco Regional Director on April 2, 1964 (R. 232). "

(PMA Brief, pp. 14-15)

"Further hearings on the grievances were held in October, 1964, after notice, and all appellants were given full opportunity to present evidence to support, contradict, supplement and explain the summarized evidence and to argue the issues. The Joint Port Committee thereafter determined that each of the appellants had failed to meet the standards for Class A registration. Appellants were given a copy of the decision and were advised of their rights to appeal (R. 91a-91c).

"Appellants' attorney addressed communications to the Joint Coast Committee. These were deemed to be an appeal from the ruling of the Joint Port Committee (R. 86). Counsel for appellants was informed that all men were invited to present their cases to the Joint Coast Committee at the designated time and place (R. 87, 91m). One man, Mr. Love, appeared at the Joint Coast Committee hearing. He was offered, but refused, the assistance of union counsel. He admitted that he failed to meet the standards to remain registered and limited his argument to an attack on the standards (R. 90-91).

"The Joint Coast Committee, in its decision issued December 18, 1964, found that the registration standards comprising the "1963 Rules" had been applied fairly and uniformly and without discrimination and that each appellant failed to meet those standards (R. 86-91). Appellants' attorney was served with the decision the day it was rendered (R. 83). The Joint Coast Committee simultaneously gave notice (R. 84-85) to each grievor of his rights under Section 17.4 of the ILWU-PMA agreement (R. 4, page 69) permitting an appeal to the Coast Arbitrator and a review, by him, of the facts of the deregistration. The decision and order of the Joint Coast Committee (R. 86 et seq.) are reproduced as Appendix B to this brief.

"It is uncontroverted that none of appellants or their attorney filed an appeal with the Coast Arbitrator (R. 83)."

(PMA Brief, pp. 15-16)

"From the time appellants were given the opportunity to respond to the summary in September, 1964, to the time of the Joint Coast Committee's decision on December 18, 1964, only *three* months were involved. In view of these facts, the claim of "delay" cannot now be used as an excuse for the failure to appeal the decision of the Joint Coast Committee to the arbitrator. No case to the contrary is cited. "

(PMA Brief, p. 73)

No. 20,719

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE R. WILLIAMS, et al.,

Appellants,

vs.

PACIFIC MARITIME ASSOCIATION, a nonprofit corporation, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, an incorporated association, et al.,

Appellees.

APPELLANTS' CLOSING BRIEF

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Appellees.

APPELLANTS' CLOSING BRIEF

INTRODUCTION

At the close of oral argument, appellees-defendants (hereinafter "defendants") requested leave to file a supplemental brief discussing the applicability of the recent case of *Vaca v. Sipes,* ..... U.S. ....., 87 S. Ct. 903, 17 L.ed. 2d 842 (1967) to the case at bar. Leave was granted by the court and appellants-plaintiffs (hereinafter "plaintiffs") were granted 20 days in which to respond.

Defendants' Supplemental Brief fails in its entirety to meet the issues in this case. In their original briefs, defendants stated and discussed the facts almost

as though the Weir affidavit did not exist, and as if the findings of the California Unemployment Compensation Appeals Board and NLRB Trial Examiner (which corroborate many of the statements in the Weir affidavit) were not part of the record. In discussing the *Vaca* case, defendants have now compounded this major shortcoming of their original briefs by twisting the clear language of *Vaca* in such a manner as to make it appear that *Vaca* merely affirmed what they have urged all along in this proceeding, instead of being diametrically opposed to all of their arguments. Once again, they have attempted to obscure the issues in order to cover up the grave injustices which were carried out against plaintiffs.

Defendants have sought to attach significance to the granting or denial of certiorari by the Supreme Court in other cases and to briefs filed by attorneys for other parties in other cases. We shall not dignify this portion of defendants' contentions by speculating as to the reasons why the Supreme Court in its inherent wisdom chose not to review other cases. Defendants' reliance upon a *brief* filed by an attorney in support of their argument that the federal courts are without jurisdiction to adjudicate this case is unworthy of comment.

We shall attempt to deal, as summarily as possible, with the issues of this case which have been settled by *Vaca v. Sipes*. Where necessary, we shall also point out the manner in which defendants have changed their position in their endeavor to avoid the impact of the *Vaca* opinion.

I. JURISDICTION OVER THE FAIR REPRESENTATION CLAIMS.

The first two causes of action of the complaint are based upon the union's duty to fairly represent plaintiffs as their statutory collective bargaining representative and the employer's acquiescence in this wrongful conduct. Plaintiffs rely upon the rule of *Steele v. Louisville & N.R. Co.,* 323 U.S. 192 (1944).

Defendants urged in their original briefs that the conduct complained of by plaintiffs were arguably unfair labor practices within the exclusive jurisdiction of the National Labor Relations Board. Other than asserting the general rule of pre-emption set out by the *Garmon* rule *(San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 1959), defendants relied upon the specific authority of *Miranda Fuel Co.,* 140 N.L.R.B. 181, which held that it is an unfair labor practice to discharge an employee, or otherwise discriminate against him, on the basis of irrelevant, invidious, or unfair considerations. (Union Brief, p. 15; P.M.A. Brief, pp. 39-40.) The briefs of defendants omitted any mention of the fact that the Second Circuit refused to enforce *Miranda.* 326 F.2d 172. The Supplemental Brief filed jointly by defendants continues to argue that the alleged wrongful conduct are nothing but unfair labor practices within the exclusive jurisdiction of the Board, despite the recent Supreme Court case of *Vaca v. Sipes,* ..... U.S. ....., 87 S. Ct. 903, 17 L.ed. 2d 842 (1967). Defendants no longer make reference to *Miranda.*

Prior to *Vaca v. Sipes,* there was a great deal of confusion as to the enforceability of *Miranda.* The

doctrine had been rejected by two members of the Board: Chairman McCulloch, and Member Fanning. The Second Circuit decision became final, and therefore the doctrine was no longer binding in New York, Connecticut, and Vermont. The Board, however, refused to be swayed by the Second Circuit's opinion denying enforcement:

> "With due deference to the circuit court's opinion, we adhere to our previous decision until such time as the Supreme Court of the United States rules otherwise." *Local 1367, Int'l Longshoremen's Association,* 148 N.L.R.B. 897, 898, fn. 7.

On November 9, 1966 (after the complaint in the case at bar was dismissed and pending appeal to this court), the Fifth Circuit decided *Local No. 12, United Rubber, C., L. & P. Wkrs v. NLRB,* 368 F.2d 12. The court declined to concur with the reasoning of the Second Circuit and held that breach of the duty of fair representation constituted an unfair labor practice under section 8(b) (1) (A) of the Act, 29 U.S.C.A. §158 (b) (1) (A), 368 F.2d 19-24. The court recognized that where there was a breach of contract as well as breach of the duty of fair representation, the employee could invoke either the primary jurisdiction of the Board or proceed in the courts. *Id.* at 22. The Fifth Circuit also enforced a similar order in a companion case, *NLRB v. Local 1367, International Longshoremen's Association, AFL-CIO,* 368 F.2d 1010, despite the reservations of Judge Choate, who believed that the prefereable procedure would be to permit individuals to file suit to adjust their grievances.

The uncertainty as to the proper forum faced by plaintiffs in the case at bench is too clear to require extensive discussion. The only circuits to have occasion to rule on the *Miranda* doctrine have reached opposite conclusions. At the time of the deregistrations and filing of the case at bar only the Second Circuit's opinion denying enforcement was in effect. Yet defendants' contention is that plaintiffs and others similarly situated should be given the often impossible task of guessing which forum is the proper one. It is obvious that to leave them so aggrieved might well result in just claims going unresolved.

Plaintiffs did go to the Board as a matter of precaution on May 17, 1965, within six months of their attempt to exhaust the internal grievance machinery of the contract. The Acting Regional Director and the General Counsel of the Board held that plaintiffs were barred by the six month statute of limitations under §10(b), for more than six months had expired since the deregistrations by the Port Committee on June 17, 1963. Although the plaintiffs filed their charges with the Board within six months of the affirmance of their deregistrations by the Coast Committee, the General Counsel ruled that the Board had no statutory authority to extend the statute of limitations. (R. 499.) In other words, by attempting to exhaust the contractual grievance machinery as defendants contend they were required to do, plaintiffs were effectively barred from obtaining relief from the Board (assuming such relief was available).

Exclusive jurisdiction in the Board to adjudicate "fair representation" cases (if such exclusive jurisdiction ever in fact existed) was specifically rejected by the Supreme Court in *Vaca v. Sipes, supra.*

> "With the NLRB's adoption of *Miranda Fuel,* petitioners argue, the broad pre-emption doctrine defined in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, becomes applicable. For the reasons which follow, *we reject this argument.*" 87 S. Ct. 909, 17 L.ed. 2d 850. [Emphasis added.]

The *Vaca* opinion is broad and far reaching, and does not have the restricted application urged by defendants. The Court recognized that a Union, as exclusive bargaining representative, has a statutory duty to fairly represent all employees in the bargaining unit under both the Railway Labor Act and the NLRA. 87 S. Ct. 909-10, 17 L.ed. 2d 850. The court also recognized that the fair representation suits often require review of substantive positions taken and policies pursued by a union in its negotiation of a collective bargaining agreement and its handling of the grievance machinery. The latter are matters not normally within the Board's unfair labor practice jurisdiction, and the court questioned whether or not the Board brings substantially greater expertise to bear on these problems than do the courts, for the courts have been engaged in this type of review since the decision of *Steele v. Louisville & Nashville R. Co.* in 1944. The Board decided *Miranda* in 1962, although §8(b) of the Act was enacted in 1947. 87 S. Ct.

910-12, 17 L.ed. 2d 850-53. Therefore, concluded the Court, there was no reason to assume that Congress intended to oust the courts of their traditional jurisdiction to curb arbitrary conduct by the individual employee's statutory representative by enacting §8(b) in 1947. 87 S. Ct. 913, 17 L.ed. 2d 853.

> "A primary justification for the pre-emption doctrine—the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable to cases involving alleged breaches of the union duty of fair representation." 87 S. Ct. 912, 17 L.ed. 2d 852.

The language of the Court thus specifically rejects the reasons advanced by defendants in their original briefs for exclusive jurisdiction in the Board under the *Garmon* rule. (Union Brief, p. 12; PMA Brief, pp. 50-51.) We note that defendants now belatedly acknowledge that fair representation suits have historically been enforced by the courts and have only recently been enforced by the Board. (Defendants' Supplemental Brief, p. 21.) Defendants persist, however, in asserting that the instant case is one within the exclusive jurisdiction of the Board for reasons which are enigmatic.[1]

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[1]As we understand defendants, they contend that the sole exception to exclusive NLRB jurisdiction under the *Garmon* rule is an action for breach of contract under §301. But the exceptions to *Garmon* are neither technical nor narrow. Aside from the fair representation cases, we note that even prior to *Vaca v. Sipes*, pre-exemption under the *Garmon* rule did not make NLRB juris-

The logic of *Steele v. Louisville & N. R. Co.* arising under the Railway Labor Act, makes it clear that it applied equally to the L.M.R.A., for the duty was based upon the Union's statutory status as exclusive bargaining representative of all employees in the unit, be they Negroes as in *Steele* or Class "B" longshoremen as in the case at bar.[2] It is significant that when *Ford Motor Co. v. Huffman,* 345 U.S. 333 (1953) was argued in the Supreme Court, the NLRB filed a memorandum taking the position that the right to equal representation was not an unfair labor practice. It said that in view of the absence of affirmative legislative history, such an unfair labor practice could not be found implicit in §7 of the Act. Sovern, *The National Labor Relations Act and Racial Discrimination,* 62 Colum. L. Rev. 563, 591, note 107 (1962). Apparently defendants believe that the Board's change of position in 1962 by adopting *Miranda* ousted the courts of jurisdiction. *Vaca v. Sipes* effectively disposes of this contention.

II. BREACH OF CONTRACT.

As we understand their Supplemental Brief, defendants argue that *Vaca* was concerned in part with a breach of the collective bargaining agreement; a

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diction exclusive as potential or arguable unfair labor practices actions based upon libel, violence, wrongful expulsion from union membership, and mass picketing. *Vaca v. Sipes,* 87 S. Ct. 911.

[2]Here, also, defendants attempt to obscure the facts by referring to the Union's good record on "racial" discrimination which is not involved in this case.

claim of breach of contract is essential to sustain jurisdiction; plaintiffs have not alleged breach of contract; therefore, *Vaca* does not permit the federal courts to adjudicate this case. Defendants have apparently misread *Vaca* and completely omitted to read the record in this case.

It is significant that defendants have not referred us to any specific language in the *Vaca* opinion which ties jurisdiction over a fair representation case to a contract violation. Indeed, the Court discussed the fair representation cases and denied the theory of exclusive NLRB jurisdiction separate and apart from considerations of contract. What the Court said with regard to any interrelation between the fair representation and contract cases was that one of the practical considerations which foreclose pre-emption of the former is that there is an intricate relationship between the duty of fair representation and the enforcement of collective bargaining agreements.

> "For the fact is that the question of whether a union has breached its duty of fair representation will in *many cases* be a critical issue in a suit under LMRA §301 charging an employer with a breach of contract." 87 S. Ct. 913, 17 L. ed. 2d 854 (Emphasis added.)

There is nothing in the opinion which holds that a connection between these questions is *mandatory*. *Vaca* discussed all the fair representation cases that have been cited by the parties in the case at bar and rejected defendants' contentions of pre-exemption by the Board.

Defendants continue to argue, contrary to the record, that plaintiffs have not alleged a breach of contract. Plaintiffs have alleged that they were discharged from their employment without cause, that the purported justifications for the deregistrations (the "1963 Rules") were invalid, and have denied that they were guilty of the violations in any event. The various contract violations are spelled out in our Reply Brief, pp. 3-4, and in our Opening Brief, pp. 68-69.

Defendants apparently concede that the "1963 Rules" pursuant to which plaintiffs were deregistered, were never reduced to writing in violation of §22.1 of the contract. They attempt to justify this shortcoming (Supplemental Brief, p. 16) by referring this court to §17.851 which provides that more stringent rules and penalties are applicable to limited registered longshoremen (the "B" men) and that mutually agreed practices shall be applicable. There is nothing in §17 which states that modifications and amendments need not be in writing (although it is significant that defendants in their affidavits have referred to the "1963 Rules" as though they were quoting from a formal written document [R. 91 W.]). The location at the end of the contract of §22.1, specifically requiring all modifications to be in writing, would certainly apply to the "mutually agreed practices" of §17.851. If there was a practice which evolved over the years for modifying the contract for purposes other than the deregistration of plaintiffs, defendants failed to make such a showing in the district court.

We cannot refrain from commenting upon defendants' argument that §17.851 permits them to apply "more stringent rules and penalties" to "B" men by "mutually agreed practices" without necessity of executing a written modification of the basic contract (and applying "mutually agreed practices" ex post facto without prior notice or specification of misconduct as in the case at bench). Such a blanket assertion of uncontrolled discretion by defendants forms the very basis of this litigation. We do not believe that Congress intended to confer plenary power upon a statutory bargaining agent at the expense of a minority of the bargaining unit. Cf. *Steele v. Louisville & N. R. Co.*, 323 U.S. 192, 199 (1944). The utter disregard for the well being of the minority by a party operating under the mandate of Congress demands the invocation of constitutional condemnation. *Id.* at 208, concurring opinion of Justice Murphy.

III. EXHAUSTION OF CONTRACTUAL REMEDIES.

In discussing *Vaca* on the exhaustion question, defendants have also drawn erroneous conclusions. *Vaca* acknowledges that the rule requiring exhaustion of contractual remedies applies to actions for breach of contract, 87 S. Ct. 913, 17 L. ed. 2d 854, but makes no mention of this requirement in the fair representation cases where the employer condones the union's discrimination and accepts its benefits. Under *Vaca,* the only relevancy of the union's unfair representation to the exhaustion issue is where the employer has

committed a wrongful discharge in breach of the agreement and the breach could be remedied through the grievance process if it were not for the union's breach of its duty of fair representation by not processing the grievance. The case at bench is more complex, for plaintiffs allege that the discharges or deregistrations themselves were the result of the union's breach of its statutory duty, as well as being contrary to the specific terms of the contract. In addition, the Weir affidavit makes clear that the union did not fairly represent plaintiffs before the Port Committee but, to the contrary, the union representatives acted as the moving parties to deregister plaintiffs.

Due to the failure of plaintiffs to completely exhaust their contractual grievance procedure by presenting their claims to the arbitrator, defendants argue that the court below was correct in dismissing the complaint. They acknowledge that *Vaca* excuses the exhaustion requirement where the union has absolute control of the grievance machinery and has used that control to prevent the processing of the grievance. (Supplemental Brief, p. 13.) Although such were the particular facts in *Vaca,* there is nothing in the opinion *requiring* such a showing to excuse exhaustion. The court adopted a flexible rule where the contractual remedies have been devised and are often controlled by the union and the employer (as in the case at bench) and recognized that they may well prove unsatisfactory or unworkable for the individual grievant. 87 S. Ct. 914, 17 L. ed. 2d 854. In the case

at bench, with the failure of defendants to provide a particularization of charges, to permit a fair hearing before the Port Committee, accompanied by excessive delays in processing the grievances, we submit that the contractual remedies were unsatisfactory and unworkable. See the summary of the deregistration and grievance process at pp. 10-17 of our opening brief.

A. Plaintiffs Were Excused from Exhausting Their Contractual Remedies Because of the Excessive Delay in Processing Their Grievances.

We have dealt extensively with the reasons that plaintiffs were not required to go to the Coast Arbitrator. (Opening Brief, pp. 70-87, Reply Brief, pp. 12-13.) We are reluctant to extend our discussion of this issue, but we are compelled to set the record straight as to the delay of defendants in processing plaintiffs' grievances. We do so only because defendants have sought to disregard the record in order to show their "good faith".

On June 17, 1963, plaintiffs were deregistered. On July 23, 1963, the deregistrations were affirmed by the Port Committee. On July 27, 1963, plaintiffs appealed their deregistrations to the Coast Committee. On April 14, 1964, the present litigation was commenced in the district court. On or about December 18, 1964, plaintiffs were notified that the Coast Committee had affirmed their deregistrations.

Despite the fact that plaintiffs waited 8¾ months from the time they *appealed* their deregistrations until filing their action in the district court, defendants argue that plaintiffs should have waited longer

before going to court. It should be noted that the decision of the Coast Committee was made known *eighteen months* after the deregistrations in June, 1963.

The Act contains no statute of limitations for the exhaustion of any contractual remedies, and a reasonable standard should be applied by the courts. In a related statute, Congress found that a workingman should not be required to wait more than four months to resolve his grievance before going to court. 29 U.S.C.A. §411(a)(4). Time is of the essence in these cases, for the possibility is always present that the union and employer will try to delay convening the grievance machinery in order to frustrate the complaining party.

But the possibility for such abuse was never more evident than in the case at bar. Defendants attempt to justify their delay as being "obviously necessary and reasonable" in order "to develop an adequate and reasonable record with regard to these grievances". (Supplemental Brief, p. 11.) But when defendants moved to dismiss the Complaint in the court below, one of the grounds advanced was that the claim was barred by laches and by the statute of limitations, §10(b) of the Act, 29 USCA §160(b), because more than six months had passed since the *deregistrations* in June, 1963, and the filing of the action. (R. 104-05.) Defendants have apparently manipulated the operation of the grievance machinery by delaying plaintiffs so that they will be barred from seeking an impartial adjudication in the courts. Defendants have

abandoned their contention that the "statute of limitations" operates as a bar in this court. By reason of their conduct, they should be estopped from invoking the arbitration provisions of the contract in defense of this action, if in fact such provisions apply.

CONCLUSION

Vaca v. Sipes makes it crystal clear that the district court had jurisdiction to hear the case at bar, and a reversal of this case is justified.

Dated, San Francisco, California,
May 25, 1967.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ARTHUR BRUNWASSER.

No. 20,719

In the

United States Court of Appeals

For the Ninth Circuit

GEORGE R. WILLIAMS, et al.,
Appellants,

vs.

PACIFIC MARITIME ASSOCIATION, a non-profit corporation, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, an unincorporated association, et al.,
Appellees.

Petition for Rehearing

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Appellees.

Petition for Rehearing

To the Honorable Walter L. Pope, Frederick G. Hamley and Charles M. Merrill, Judges of the United States Court of Appeals for the Ninth Circuit.

Appellee Pacific Maritime Association respectfully petitions the Court to reconsider its decision and supporting opinion dated August 28, 1967, to call for further written and oral argument on issues involved, and to request the Chief Judge to convene the Court *en banc* for purposes of the requested rehearing.

We believe that the panel has issued an opinion without having had a sufficient opportunity to consider and weigh issues of fundamental significance "as there evolves in this field of labor-management relations that body of federal common law of which *Lincoln Mills* spoke".[1] The opinion suggests that this common law includes propositions that would do grave and extensive harm to the collective bargaining process and that would open the courts to an untoward mass of litigation. The major issues in such invited litigation should be left to the private law and tribunals of industry-union contracts, thus permitting them to be decided in accordance with the labor relations policy of the United States that the run of the mill employer-employe problems shall be resolved through the collective bargaining process. Other issues invited into the courts, as to discharges for anti-union activity, should continue to be resolved only through the Labor Board's process. If the federal courts were opened, as this Court's opinion opens them, it would burden them with matters that are of such a character and number as to preclude their resolution through the existing judicial system. We submit that on rehearing, after considering further oral and written argument, the Court will conclude that its August 28 decision is unwarranted and the Court will set down principles of this common law that will positively contribute to the effectiveness of the courts in their usual areas, to the effectiveness of the collective bargaining process as a significant element of the economy of the nation, and to the utilization of the Labor Board in its traditional area of expertise.

We recognize that grave burdens are placed on an appellate court in considering the complex issues here presented. This is

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1. *Dowd Box Co. v. Courtney*, 368 U.S. 502, 514 (1962) referring to *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-457 (1957).

particularly true where, as here, they come up on appeal from a summary judgment entered prior to answer, admissions, depositions, discovery, pre-trial and other procedures for clarifying the legal issues and more precisely and accurately stating the facts that are not open to dispute and are critical to a decision of the case. However, if the August 28 opinion is permitted to stand, a more onerous and socially unjustifiable burden is placed on the parties, the collective bargaining process and the lower courts. We believe that the district court correctly concluded that the fifty-odd plaintiffs were lawfully terminated, that it would be against the interests of the many individuals for them to spend time and money in further steps in a hopeless case, and that neither the courts nor the defendants should be required to go further into a morass of pleading, discovery and pre-trial procedures that would serve only to clarify that there was no violation of the collective bargaining contract.

Undisputed facts show that the appellants are attacking discharges for cause that were permitted by the collective bargaining contract.

We submit that, with the one exception stated in the second paragraph hereof, the federal common law of labor relations does not authorize the courts to determine whether employes were *in fact* discharged for cause if the cause is a basis for discharge under the collective bargaining contract. Here, the decisions of the joint committee discharging each appellant for one or more of certain reasons - cheating ("chiseling") in the work assignment process to get an unfair portion of the available work, undue absenteeism from work, excessive delays in paying bills for use of the dispatch hall, intoxication and pilferage - are under attack. As we show below, these reasons were proper grounds for discharging longshoremen under contract terms not questioned in this case. Here, the governing rule is the ordinary rule that decisions of the grievance committee having jurisdiction shall govern.

The joint labor relations committee, which discharged the appellants and heard the attacks on these actions and affirmed them, is analogous to many government agencies - and also to private organizations such as unions or other associations - in its multiplicity of functions. It has the legislative function of deter-

mining policy in agreeing upon the formal and informal rules, practices and other guides necessary to supplement the generalities or constitution-type rules set out in the basic contract document, in filling in the interstices in that document, and in otherwise reaching policy decisions in matters not of such magnitude or foreseeability as to have been resolved in the basic negotiation process. This joint committee also has the executive function of directing the operations of the halls for dispatching longshoremen to their daily work assignments, of selecting and discharging the longshoremen using the hall, and of making related policy decisions of an executive character. It has the administrative function of making the basic contract and the supporting rules, practices and other supplementary guides an effective machinery for governing the employer-employe relationship and resolving both the routine disputes as to contract meaning and the day-by-day issues that make the basic collective bargaining process a living, continuing activity throughout the contract period. Finally, the joint committee has the judicial function of deciding the merits of claims raised by individuals that they have been denied some substantive right under the contract (as that requiring a certain rate of pay) or some procedural protection (as that against certain types of discrimination) and of adjudicating such claims even where it is claimed that it, rather than an employer or union, has denied such a right or protection.

The governmentally imposed limitation on the power of this multi-function agency is that set out in *Humphrey v. Moore,* 375 U.S. 335 (1964), and *Vaca v. Sipes,* 386 U.S. 171, 17 L.ed 2d 842 (1967). The labor relations committee cannot perpetrate a contract violation in its administrative function (*Humphrey*) or its adjudicative function (*Vaca*) through the union's breach of the duty of fair representation. Invidious or hostile discrimination that causes a contract violation is actionable. Otherwise the grievance machinery decision is "final and binding upon the parties, just as the contract says it is".[2]

The Court's holding that failure to exhaust the grievance-arbitration procedure is not fatal to appellants' case is based on the proposition that "the action of the Joint Coast Labor Rela-

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2. *Humphrey v. Moore,* 375 U.S. 335, 351 (1964) citing *Drivers Union v. Riss & Co.,* 372 U.S. 517 (1963).

tions Committee [of December 18, 1964 (R. 84-91)] would be final according to the contract" if appellants could establish their argument that they were claiming only something other than § 13 discrimination (printed op. p. 10). The Court should now take the next step in deciding that if this argument were established, the courts would be obliged to accept that action as final in this proceeding. The Supreme Court opinions cited establish that the failure and inability of plaintiffs to show invidious or hostile discrimination precludes judicial review of the decision that the contract says is final and binding.[3]

The opinion is contrary to established law.

The August 28 opinion overrules earlier decisions requiring that such invidious or hostile discrimination be pleaded and shown in some detail. *Hardcastle v. Western Greyhound Lines,* 303 F.2d 182 (9 Cir. 1962), so holds. The instant opinion is based on the proposition that there might be some discrimination. Not even is there an indication that it must be of such a hostile or invidious nature; much less is there any requirement that the factual nature of it be set forth. If the federal common law is to be changed so as to make such precision unnecessary, the question should be reheard in detail, and *en banc,* before such a far-reaching decision is entered overruling the cited Supreme Court and Ninth Circuit opinions.

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3. It would seem that the August 28 opinion confuses the distinction between discrimination and discharge. When an employer or a labor relations committee determines that certain persons should be discharged and certain other persons should not be discharged, there is an act of discrimination in making this decision. Thus there was discrimination in the action of selecting 97 longshoremen for discharge while advancing in registration the 450 or so remaining from the original group of 750 Class "B" longshoremen registered in 1958. The mere discrimination of treating some men one way and others another way is, however, insufficient to establish a basis for judicial intervention unless the courts are going to decide the merits of every discharge. The action of discriminating between the persons selected for discharge and those not selected for discharge is open for judicial consideration only if the motivation for the action was invidious or hostile within the meaning of these terms, which has developed in the many opinions from *Steele v. Louisville & Nashville R.R. Co.,* 323 U.S. 192 (1944) through *Vaca v. Sipes,* 386 U.S. 171, 17 L.ed. 2d 842 (1967). Initially this meant racial discrimination. There have been indications that it may include other types of invidious discrimination but the cases do not define what falls within this area. It is clear, however, that a motivation that is highly unacceptable to society is necessary in order to justify judicial intervention in discrimination in discharging employees.

The Court's conclusion will greatly disturb the collective bargaining process if it stands. That process exists to provide speedy, final disposition of employment-related issues through recognition of the extraordinary character of the union's status as the employes' exclusive representative for collective bargaining purposes.[4] This function cannot be fulfilled unless grievance machinery decisions as to the facts and the contract meaning are open to judicial review only in rare cases where *Steele* type discrimination is properly before the court. Such discrimination needs to be alleged in the pleadings, where a demand therefor is made; it needs to be spelled out in some precise detail in some way, as in factual affidavits, where the issue as to such discrimination is critical in summary judgment proceedings; it needs to be clear in the findings after full trial. Only if those attacking the collective bargaining process are required to bear such burdens of pleading, discovery and proof, can the courts perform their function of protecting the process itself. The courts cannot take on the task of hearing the merits of every discharge of a person who imagines himself to be, or even actually is, an anti-Establishment union member. The courts should see only that the tribunals with jurisdiction do not abuse it by violating the contract through invidious or hostile discrimination.

For the reasons above-stated and for the reasons expressed in the petition of appellees International Longshoremen's and Warehousemen's Union, et al., we request the Court to grant a rehearing.

Dated: September 27, 1967.

Respectfully submitted,

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4. For example the employer is obligated under the Act to deal exclusively with the union and may not deal directly with employes themselves. *Medo Photo Supply Corp. v. N.L.R.B.*, 321 U.S. 679, 684 (1943). Furthermore: "The Act imposes no obligation upon a bargaining agent to obtain employee ratification of a contract it negotiates in their behalf." *North County Motors, Ltd.*, 146 NLRB 671, 674 (1964). Cf. *N.L.R.B. v. Wooster Division of Borg Warner Corporation*, 356 U.S. 342 (1958); *Houchens Market of Elizabethtown, Inc.*, 155 NLRB 729 (1965).

CERTIFICATE OF COUNSEL

Dennis T. Daniels, attorney for appellee Pacific Maritime Association, certifies that he has read and knows the contents of the foregoing petition and that said petition in his judgment is well founded and is not interposed for the purpose of delay.

DENNIS T. DANIELS

Attorney for appellee
Pacific Maritime Association

September 27, 1967

No. 20,719

United States Court of Appeals

For the Ninth Circuit

GEORGE R. WILLIAMS, et al.,
Appellants,

vs.

PACIFIC MARITIME ASSOCIATION, a non-profit corporation, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, an unincorporated association, et al.,
Appellees.

APPELLEES' PETITION FOR A REHEARING

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Appellees.

APPELLEES' PETITION FOR A REHEARING

To the Honorable Walter L. Pope, Frederick G. Hamley and Charles M. Merrill, Judges of the United States Court of Appeals for the Ninth Circuit:

Appellees International Longshoremen's and Warehousemen's Union, et al., respectfully petition the Court to reconsider and amend its decision of August 28, 1967.

I. We believe that the Court erroneously has concluded that the trial Court can set aside the discharges of the appellants if the trial Court determines that it would be inequitable for them to be discharged and that some type of "discrimination" by the union was involved in the decision to discharge them. Appellants have urged, to the contrary, that the Court has no authority under § 301, or any other basis of federal jurisdiction, to set aside the discharges unless it be found that the decisions to discharge violated specific contract terms, as distinguished from an erroneous deciding of factual questions in applying contract terms, and that this contract violation was the result of hostile and invidious discrimination. We submit that the record before the Courts show that there is, at most, a finding of fact by the joint labor relations committee that is under attack.

Appellants were employed as longshoremen under rules adopted by the joint labor relations committee to implement the basic contract provisions authorizing more stringent rules as to Class "B" longshoremen. These implementing rules specifically provided that a limited registration longshoreman could be discharged "for any cause" except a cause prohibited by § 13 of the contract. These 1958 rules are not challenged. Appellants have negatived any claim that there was a discharge pursuant to § 13, and the Court's opinion clearly indicates that any claims of § 13 issues are not to be considered in this proceeding. Therefore, the decisions to deregister cannot be set aside as being contract violations if the discharges effected by the Joint Labor Relations Committee were "for any cause".

The affidavits presented, while they do not go to the factual issues as to whether or not the Joint Labor Relations Committee was correct in the decisions it made as to the facts of cause, do establish that the decision upheld discharges for cause. Appellants ask the Court to decide

there was error in the findings of fact as to cause made by the Joint Labor Relations Committee. *Vaca* holds that the Courts will not reverse simply because they, or the jury, would decide the fact issues differently than the grievance committees decided them.

We further assert that the Court erroneously concluded that any "discrimination" is sufficient to justify judicial intervention. By the actions of appellants in disclaiming any discrimination of the type that is prohibited by § 13, the range of potential discrimination is circumscribed to a minuscule area. Appellants in no way specify or define the nature of the claim of discrimination that they make, other than to the claim that the appellants are not permitted to be heard in advance of the rule-making action in determining what would be the standards applied to selecting them for retention or deletion from the longshore registration list and to claim routine unfair labor practices under the National Labor Relations Act. We submit that the Court was, under the opinions of the Supreme Court, obliged to sustain the summary judgment in the absence of more precise specification of the discrimination relied upon to show it to be "invidious or hostile" and in the absence of a detailed consideration and decision by this Court that the specified type of discrimination is "invidious and hostile" discrimination within the Supreme Court rulings in *Vaca v. Sipes* and *Humphrey v. Moore*.

There is no merit in the suggestion that there was "invidious or hostile" discrimination simply because the union did not hold hearings at which the Class "B" longshoremen could appear before it reached a decision with the employer members of the Labor Relations Committee to follow the standards that were used. Unions under the National Labor Relations Act have an exclusive agency power of a unique nature, one in which the union can make decisions of this type without going through any procedures of notice of hearing to persons it represents before reaching a decision. The collective bargaining process could not function if these formalities

were established as requirements for decision-making in determining rules and standards of contract administration or negotiation.

The Court also appears to hold that discrimination that is in violation of the usual provisions of the National Labor Relations Act that have been enforced for many years, in distinction to the new limitations on union activity arising out of the Court-made "statutory duty of fair representation", can be a basis for its decision. The nature of discrimination that can justify a *Vaca v. Sipes* type decision is of an entirely different type, a type not within the ordinary expertise of the Labor Board.

The opinion of the Court should be clarified in regard to what is the type of discrimination it feels has been raised here and that could be a basis below for a decision to set aside the deregistrations. The question of what type of discrimination opens the door to Court litigation of labor relations issues is an important and significant issue in the development of the law of labor relations. The nature of discrimination that can be a basis for such action in the eyes of this Court should be set forth in the opinion so that there is a clear basis for presenting issues to the United States Supreme Court on petition for certiorari should the Court feel that it has correctly determined the law on this subject.

II. We ask that the Court's opinion be amended to state more clearly that it is not making findings as to fact, or reaching conclusions as to the meaning of the contract, that are binding during further hearings in this case. True, the opinion as a whole indicates that the Court is setting aside a summary judgment and is doing so on the basis of what the appellants *might* be able to establish. The opinion indicates the Court is not acting on the basis of what will be the proper findings of fact and what will be the entirety of the contract provisions and terms that will be before the lower Court. However, at least one paragraph could be read differently.

The paragraph on pages 6 and 7 of the printed opinion dealing with "the so-called new rules" might be claimed

to imply that the Court is making a conclusive decision that these rules do not authorize the deregistration of any longshoreman and that these rules are invalid under the basic contract. This paragraph, of course, is based on a record in which appellants' affidavits must be taken as true, and they were assumed to be true in appellees' arguments before this Court. The record was one in which there was no evidence, much less findings on conflicting evidence, as to what was the actual form of the standards (which appellants label the "1963 rules") or the circumstances of their adoption. In fact, at page 11 of the printed opinion, this Court states that there is "an unsatisfactory record of alleged changes in rules". The paragraph on pages 6 and 7 and the succeeding paragraph assert that these standards (the "1963 rules") did not relate to deregistration; however, an affidavit (R. 756) states, "It was also agreed that persons then on the limited (Class "B") registration list were not found to be qualified and eligible for advancement to the full (Class "A") registration list [under these standards] would be deregistered and discharged from employment." *Specifically we ask that the paragraph on pages 6 and 7 be amended to state that this court is not deciding, in reversing the summary judgment, that the present record would permit the trial Court to decide that the rules were not validly adopted.*

III. The Court's opinion should similarly be modified in the statement (p. 2) that Class B longshoremen "were not eligible to membership in Local No. 10". There is no such suggestion in the collective bargaining contract. No issue of fact was raised on this point. Simply, the question was not considered by appellees to be relevant to the motions for summary judgment. Similarly, the opinion states that the 1963 rules were adopted "about June 17, 1963" (p. 1); this is the precise date the Court finds that appellants were deregistered. Later the Court appears to be making the inconsistent, but equally conclusive, statement that the rules were "adopted a few weeks prior . . ." to June 17, 1963 (p. 2). The opinion

also appears to make a conclusive statement that appellants had no notice of the adoption of the 1963 rules (p. 2). This Court's opinion, dealing with an order for summary judgment, should be limited to saying that appellants' allegations of fact entitled them to a trial. The trial Court will have to determine these facts if they become material issues; this Court should not appear to resolve them now.

IV. The undersigned appellees refer the Court to pages 58-61 of their brief dated January 30, 1967. The authority cited therein makes it clear that *individual officers of a labor organization* are not liable for damages in an action founded on § 301. We request the Court to amend its opinion to dispose of this issue at this time by dismissing the individual defendants from this action, thereby avoiding needless expense to the parties and needless waste of time by the district judge.

V. The undersigned appellees similarly request the Court to amend its opinion so as to resolve against appellants their claim that the district court has jurisdiction in a § 301 suit to grant injunctive relief. Such relief is clearly barred by the Norris-LaGuardia Act (29 U.S.C. § 101). *Atkinson v. Sinclair Refining Co.,* 370 U.S. 238; *Sinclair Refining Co. v. Atkinson,* 370 U.S. 195.

For the reasons above stated and for the reasons expressed in the petition of appellee Pacific Maritime Association, we request the Court to grant a rehearing.

Dated, San Francisco, California,
September 27, 1967.

Respectfully submitted,

GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,
NORMAN LEONARD,
Attorneys for Appellees International Longshoremen's and Warehousemen's Union, et al.

Certificate of Counsel

Norman Leonard, attorney for appellees International Longshoremen's and Warehousemen's Union, et al., certifies that he has read and knows the contents of the foregoing petition and that said petition in his judgment is well founded and not interposed for the purpose of delay.

Norman Leonard,
Attorney for Appellees International Longshoremen's and Warehousemen's Union, et al.

No. 20,762

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

JOSEPH T. STRONG d/b/a STRONG ROOFING & INSULATING CO., RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court on the petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),[1] for enforcement of its order (R. 18-19)[2] against Joseph T. Strong, d/b/a Strong Roofing

[1] The pertinent statutory provisions are reprinted in Appendix A, *infra*, pp. 22-33.

[2] References designated "R" are to Volume I of the Record as reproduced pursuant to Rule 10 of this Court. References designated "Tr." are to the reporter's transcript of the testi-

& Insulating Co., issued April 22, 1965, and reported at 152 NLRB No. 2. This Court has jurisdiction of the proceeding, the unfair labor practices having occurred in Alhambra, California, where respondent is engaged in the residential and commercial roofing business.[3]

STATEMENT OF THE CASE

I. The Board's Findings of Fact

Briefly, the Board found that respondent violated Section 8(a)(5) and (1) of the Act by refusing to sign and honor a collective bargaining agreement

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mony as reproduced in Volume II of the Record. References designated "GC Exh.," "R. Exh.," or "TX Exh." are to exhibits of the General Counsel, Respondent and Trial Examiner respectively.

[3] Respondent contests the Board's assertion of jurisdiction on the grounds that Strong, as an individual proprietor, annually purchased less than $50,000 worth of supplies originating outside the state of California (Tr. 88). The Board, however, determined that Strong was engaged in a business affecting commerce within the meaning of Sections 2(6) and (7) of the Act because, at all times material herein, he was a member of a multi-employer bargaining association at least one of whose members annually performed more than $50,000 worth of services outside the state of California (R. 12-13; Tr. 6, 7). As the ultimate question to be determined on the merits is also whether Strong was a member of the multi-employer bargaining association, it is apparent that if the Board's determination on the merits is correct, and Strong is a member of the bargaining association, then its assertion of jurisdiction is also correct. See, e.g., *N.L.R.B.* v. *Cascade Employers Association, Inc.*, 296 F. 2d 42 (C.A. 9), remanded on other grounds; *N.L.R.B.* v. *Miscellaneous General Drivers, Local 610*, 293 F. 2d 437 (C.A. 8); *Insulation Contractors of Southern California, Inc.*, 110 NLRB 638.

negotiated on its behalf by a multi-employer association to which respondent belonged and through which it participated in multi-employer bargaining with the Union,[4] and by refusing to continue to recognize and to bargain with the Union as the representative of respondent's employees in a multi-employer bargaining unit. The evidence upon which the Board based these findings may be summarized as follows.

A. *Background: The Roofing Contractors' Association*

The Roofing Contractors Association of Southern California, Inc., hereafter called the Association, was formed for the purpose, *inter alia*, of negotiating labor contracts with the Union (R. 13; Tr. 9, 18; GC Exh. 2). The by-laws of the Association provide for three types of membership, regular, associate contractor, and associate (R. 14; Tr. 24; GC Exh. 2). Regular members are contractors who operate union shops and who, under the by-laws of the Association, are bound by the collective bargaining contract negotiated by the Association (R. 14; Tr. 18, 19, 26-27; GC Exh. 2). Associate contractor members are contractors who operate non-union shops and who are not covered by the Association's collective bargaining agreement (R. 14; Tr. 24-25; GC Exh. 2). Associate members are manufacturers, suppliers, or wholesalers of roofing materials (Tr. 24, GC Exh. 2).

Prior to the start of contract negotiations, the Association mails authorization proxies to its members.

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[4] Roofers Local 36, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association, hereafter called the Union.

The proxies are mailed to regular members for their information only. Whether or not regular members sign proxies, they are bound by any agreement reached in the negotiations (R. 17; Tr. 28-29).[5] Throughout negotiations, the Association keeps all of its members informed of their progress by mail (R. 15; Tr. 16-18, 29). Though regular members are automatically bound by the collective bargaining agreement negotiated, it has been the past practice of the Union to have them sign a copy of the contract (R. 14-15; Tr. 36-37, 86, 90-91).

B. *Respondent: its membership in the Association and attempted withdrawal in 1962*

Respondent is an individual proprietor doing business under the trade name of Strong Roofing & Insulating Co., and is engaged in the roofing of residential and commercial buildings (R. 12). Strong joined the Roofing Contractors Association about 1949 and at one time served as its president (R. 13; Tr. 59, 85). He had been for many years a regular member, as defined in the Association's by-laws (R. 13, 14; GC Ex. 3, p. 7).

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[5] The Association's By-laws provide (GC Exh. 2, p. 9):

"Each and every regular member shall recognize the Association, its counsel, and each of its duly selected labor committees as the member's exclusive bargaining representatives for negotiating, reaching, agreeing to abide by, and/or signing any and all collective bargaining agreements with labor unions . . . . Any such labor contract negotiated by the Committee shall be binding upon the regular members of this Association separately and collectively."

As a regular member of the Association, Strong signed the August 15, 1960, to August 14, 1963, agreement between the Union and the Association (R. 14; Tr. 13, 37). On January 23, 1962, during the contract term, Strong wrote the Union requesting termination of the contract at the earliest possible time (R. 14; Tr. 63, R. Exh. 2). This letter was unanswered; and there is no evidence that it was ever received by the Union or transmitted to the Association (R. 15; Tr. 40-41, 65). Despite the letter, Strong continued to observe the contract, and paid fringe benefits to the Union Roofers Trust Account (R. 14; Tr. 65-66).[6]

C. *Negotiations for a New Contract*

Prior to March 1963 when negotiations for a new contract began, (R. 15; Tr. 16), the Association, pursuant to its usual practice, mailed Strong an authorization proxy which he neither signed nor returned (R. 17; Tr. 62-63). Strong did not remember whether he had signed an authorization prior to the 1960 negotiations, but testified that in the past he had not always signed the proxies (R. 17; Tr. 62). Negotiations between the Union and the Association continued until August 14, 1963, when the terms of a new four-year contract were agreed upon (R. 15; Tr. 16, 35). This contract, ratified by the Union's membership on August 17, 1963, had an effective date of

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[6] The contract term was from August 15, 1960, to August 14, 1963, and from year to year thereafter, unless notice was given 60 days prior to August 14, 1963, or any subsequent yearly period (R. 15; TX Exh. 1).

August 15, 1963 (R. 15; Tr. 16, 35, GC Exh. 4). During the negotiations, the Association informed all regular members, including Strong, of progress and invited them to attend two open negotiating sessions (R. 15; Tr. 16-19, 69). Strong received all of the progress reports and continued to observe the expiring contract during the negotiations (R. 14, 15; Tr. 19, 65-66, 69).

D. ***Respondent's Refusal to Sign the Collective Bargaining Agreement***

On August 20, 1963, three days after the Union's membership ratified the agreement, Strong wrote the Joint Labor Relations Board, a grievance board composed of contractor and Union representatives (R. 15; Tr. 21, 22), requesting termination of the contract and the refund of his security deposit,[7] "persuant [sic] to that Artle [sic] in the Master Agreement dated August 15, 1963; to and including August 15, 1967, pertaining to the termination of the Master Contract" (R. 15; Tr. 22, 66, 67, R. Exh. 3).[8] Upon receipt of this letter the Joint Board, without further action, turned it over to the Association's representative (R. 15; Tr. 22-24).

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[7] Strong, as required by the Master Agreement, gave a $400.00 security deposit to the Association to insure payment of wages and fringe benefits. The Association, in turn, bonded Strong for $1,000.00 (R. 15; Tr. 14-15, 22-23; TX. Exh. 1; GC Exh. 4).

[8] The termination clause in the new contract is the same as that contained in the prior agreement described in footnote 6, *supra* (R. 15; GC Exh. 4).

In September 1963, Strong telephoned the Association and asked that his status be changed from that of a regular member to that of an associate contractor member (R. 16; Tr. 14-15). However, Strong paid the higher, regular member dues in October, November, and December (R. 16; Tr. 20; GC Exh. 3) and paid fringe benefits to the Union Roofers Trust Fund in September and October 1963 (R. 15; Tr. 69, 78, 88; GC Exh. 5(a) and (b)), pursuant to his belief that the new agreement required 60-days notice any time during the contract term in order to terminate it (TX 4; Tr. 66-70).

In December 1963, the Association credited Strong's account with $6.75, the difference between the regular and associate membership dues for October, November, and December (R. 16; Tr. 20; GC Exh. 3). In January 1964, Strong's $400.00 deposit was returned by the Association (R. 16; Tr. 23, 70). Prior to the return of his deposit by the Association, Strong had not received an answer to his August 20, 1963, letter to the Joint Board requesting termination of the contract (Tr. 69).

On October 18, 1963, December 10, 1963, and again in April 1964, Union representatives contacted Strong and his wife, who managed the Company office, in an attempt to have the new contract signed. On October 18, Mrs. Strong told Union representative Sheridan that her husband had withdrawn from the Association and therefore would not sign. When Sheridan called the next day, Mrs. Strong told him that she had spoken to her husband who had con-

firmed his intent to withdraw and that he therefore would not sign the agreement. On December 10, 1963, Strong's wife said that they would not sign the contract because they no longer employed any union members. Finally, in April 1964, Strong himself refused to sign the agreement for "economic reasons" (R. 16; Tr. 37, 51-52, 72-73, 84-85, 90-91).

II. The Board's Conclusion and Order

The Board found that respondent violated Section 8(a)(5) and (1) of the Act by refusing on and after April, 1964 to recognize and to bargain with the Union as the representative of respondent's employees in an appropriate multi-employer unit comprised of the employees of the Association's regular members (R. 7).

The Board's order requires respondent to cease and desist from the unfair labor practices found and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their statutory rights. Affirmatively, the Board ordered respondent to (a) execute and honor the 1963 to 1967 agreement between the Union and the Association; (b) pay to the appropriate source any fringe benefits provided for in the contract; and (c) post appropriate notices (R. 17-19).

ARGUMENT

I. Substantial Evidence On The Record As A Whole Supports The Board's Finding That Respondent Violated Section 8(a)(5) And (1) Of The Act By Refusing To Sign And Honor The Collective Bargaining Agreement Negotiated On Respondent's Behalf By The Employer Association To Which It Belonged And Which Represented It In Bargaining With The Union

A. *Respondent was a member of the Association in April 1964, when it unlawfully refused to sign the Association-Union Agreement*

Respondent's refusal to sign the collective agreement in April, 1964 for the third time clearly violated the Act. The law is settled that an employer violates the Act by refusing to sign an agreement reached between a union and a multi-employer association of which the employer is a member. *N.L.R.B.* v. *Jeffries Banknote Co.*, 281 F. 2d 893, 896 (C.A. 9); *N.L.R.B.* v. *Sheridan Creations, Inc.*, 357 F. 2d 245 (C.A. 2); *Cook & Jones, Inc.*, 146 NLRB 1664, 1673-1674, enforced 339 F. 2d 580 (C.A. 1). The record in this case makes plain that respondent was a member of the Roofing Contractors Association in April 1964. Respondent had been a member since 1949, Strong had been president of the Association (Tr. 85), and respondent had signed the August 15, 1960, agreement. It continued to abide by that agreement during its term and observed the requirements of the 1963 contract through October 1963. And respondent did not notify the Union, upon receipt of the 1963 proxies and information regarding the 1963 negotiations, that it no longer considered

itself a member. Finally, the withdrawal letter which respondent sent to the Joint Labor Relations Board on August 20, 1963 and respondent's payment of fringe benefits under the 1963 contract further demonstate that respondent had not withdrawn prior to the onset of the March 1963 negotiations. Consequently, the Association was respondent's bargaining representative when the March negotiations began.

Respondent's letter of August 20, 1963, could not terminate respondent's membership in the unit. That letter was written some five months after the Association and the Union had begun to negotiate a new contract. It has been judicially recognized that once negotiations for a new contract begin, an employer may not withdraw from a multi-employer association. *N.L.R.B.* v. *Sheridan Creations, Inc.* 357 F. 2d 245 (C.A. 2); *Universal Insulation Corp.* v. *N.L.R.B.*, No. 16304 (C.A. 6), decided May 20, 1966; *N.L.R.B.* v. *Jeffries Banknote Corp., supra.*[9] The Second Circuit explained the reasons for this rule in the *Sheridan Creations Co.* case as follows (357 F. 2d 247-248):

> "To permit withdrawal after negotiations commence might well lead to a breakdown of the

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[9] Accord, *The Kroger Co.*, 148 NLRB 569; *Retail Associates, Inc.* 120 NLRB 388, 395; *Ice Cream, Frozen Custard Industry Employees, Local 717, Teamsters (Ice Cream Council, Inc.)* 145 NLRB 865, 869-872; *Walker Electric Co.* 142 NLRB 1214, 1220-1221; *Detroit Window Cleaners Union Local 1391 (Daelyte Service Co.)*, 126 NLRB 63; *Spun-Jec Corp.*, 152 NLRB No. 96; *Carmichael Floor Covering Co.*, 155 NLRB No. 65; see also, *International Restaurant Associates*, 133 NLRB 1088, 1089-1091.

> unit. Withdrawal should be restricted to the period before negotiations to assure that it is not used as a bargaining lever. Since this is the purpose of the rule, it is used as an alternative to an inquiry into good faith. . . . A shift in membership after negotiations have begun has lively possibilities for disrupting the bargaining process. In a case such as this, good faith withdrawal of a small unit might in practice have minimal or no effect. However, the potential for disruption is sufficient to justify the Board in adopting a uniform rule for all cases that withdrawal is not timely once bargaining has begun.

This case illustrates the "potential for disruption" to which the Court referred. Responding to the Union's April 1964 request that it sign the contract, respondent justified its refusal on the ground that a "number of the contractors were . . . non-union—that he felt it also hurt his business—and that he would rather go non-union rather than sign it" (Tr. 52). Plainly, multi-employer bargaining could not remain a "vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining," (*N.L.R.B.* v. *Truck Drivers Local 449*, 353 U.S. 87, 95) if an employer could, for "economic reasons" (Tr. 73), refuse to sign an agreement negotiated on its behalf. Under such circumstances, unions would hesitate to make fruitful concessions in multi-employer bargaining, since those concessions might be taken as the starting point for bargaining between the Union and members of the Association who might withdraw

from the unit in order to obtain better terms by bargaining individually. Furthermore, employers might use threats of withdrawal as a bargaining weapon, thus disrupting the stability of the unit. The Board's rule prohibiting withdrawal once bargaining begins is thus reasonable, and the Board's corollary finding here that respondent violated Section 8(a)(5) and 8(d) of the Act by refusing to sign the agreement is entitled to affirmance.

B. ***The Union did not consent to respondent's withdrawal from the bargaining unit prior to April 1964***

Where the union consents to an employer's wish to withdraw from a multi-employer unit, the employer's withdrawal is effective even if, absent consent, withdrawal would have been untimely. See *Spun-Jee Corp.*, 152 NLRB No. 96, 59 LRRM 1206 (issued May 26, 1965); *Atlas Sheet Metal Works, Inc.*, 148 NLRB 27, 29; *C & M Construction Co.*, 147 NLRB 843, 845. But the Board properly rejected respondent's argument here that the Union consented to its withdrawal by failing to insist that Strong pay fringe benefits required under the new contract. Strong paid those benefits during August, September and October 1963. When respondent first failed to remit benefit payments in November, it had already told union representative Sheridan that it had withdrawn from the Association and would not sign the contract (*supra*, p. 7). Thus, further demand for benefit payments due would have been futile. Consequently, the Board properly refused to construe the Union's

failure to demand such payments as indicating acquiescence in Strong's attempted withdrawal.[10]

Respondent also contends that statements by union representatives when they three times asked respondent to sign the contract evidence consent to respondent's withdrawal from the unit. On October 18, 1963, union representative Sheridan came to respondent's office and asked that the agreement be signed. Told that Mr. Strong had written a letter evidencing his intent not to sign, Sheridan expressed surprise and added "I hate to see you drop out." The next day Sheridan called to ask if respondent was persisting in its refusal, and was told that it was. Thereafter, the Union twice more sought to have Strong sign the agreement, threatening a work stoppage on one of those occasions (Tr. 92), but Strong persisted in his refusal. In light of the Union's repeated attempts to have the contract signed pursuant to its practice with respect to regular members, we submit that the Board properly held that the Union had not consented to respondent's withdrawal from the unit. Compare *Atlas Sheet Metal Works, supra* (union consented to withdrawal by failing to present contract for signature and by bargaining with employer individually).

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[10] That the Association allowed respondent to withdraw and returned his performance bond (R. 5) does not constitute consent by the Union to respondent's withdrawal from the unit, since the record does not show that the Union acquiesced in these actions by the Association.

II. The Board Properly Rejected Respondent's Contention That The Complaint Was Barred By Section 10(b) Of The Act

The complaint in the instant case was based upon a charge filed on June 2, 1964.[11] As shown in the Statement, respondent refused for the third time to sign the contract in April 1964, less than six months before the charge was filed. Consequently, the complaint in this proceeding was not barred by Section 10(b) of the Act which precludes the Board from issuing a complaint based upon a charge alleging a violation of the Act which occurred more than six months before the charge was filed. See *N.L.R.B.* v. *White Construction Co.*, 204 F. 2d 950, 952-953 (C.A. 5).

In its brief to the Board, respondent, relying on *Local 1424, IAM* v. *N.L.R.B. (Bryan Mfg. Co.)*, 362 U.S. 411, argued that Section 10(b) prevented the Board, in assessing the lawfulness of respondent's April 1964 refusal to sign the agreement, from considering events occurring prior to January 2, 1964. Respondent misreads Section 10(b). In *Local 1424, supra*, the Supreme Court said (362 U.S. at 416-417):

> [I]n applying rules of evidence as to the admissibility of past events, due regard for the purposes of Section 10(b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six month limitations period in and of themselves may constitute, as a substantive matter, unfair

[11] GC Exh. 1.

> labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose Section 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of earlier unfair labor practices is not merely "evidentiary" since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful.

In the instant case, the Board properly treated respondent's continuing membership in the Association, the negotiation of the 1963 contract, and respondent's refusal to sign it in October and December, 1963, as evidentiary matters which "shed light on the true character of matters occurring within the limitations period," *id.*, at 416, and not as unfair labor practices which "cloak with illegality that which was otherwise lawful." *Id.* at 417. Accord, *Local 269, IBEW*, 149 NLRB 768, 773-774, enforced, 357 F. 2d 51 (C.A. 3). Nor was it improper for the Board to consider whether respondent effectively withdrew from the Association in August 1963. The letter of withdrawal was not held to constitute an unfair labor practice. The Board held only that the letter was not a defense to the unfair labor practice charge.[12]

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[12] *N.L.R.B.* v. *Pennwoven, Inc.*, 194 F. 2d 521 (C.A. 3), cited in respondent's brief to the Board, is not in point. There, the court held that Section 10(b) barred a finding that a failure

III. The Board's Order Is Valid And Proper

The Board's Power to Remedy Unfair Labor Practices Includes the Power to Restore the Status Quo

Having found that respondent violated Section 8 (a)(5) of the Act, the Board ordered respondent to sign and honor the contract and to pay to the appropriate source any fringe benefits provided for in the contract. The Board's power to compel an employer to sign and honor a collective agreement which it has unlawfully refused to sign has been recognized by this Court. *N.L.R.B.* v. *Gene Hyde*, 339 F. 2d 568 (C.A. 9). And the requirement that respondent pay fringe benefits simply directs respondent to treat the contract as binding. Since respondent's failure to make those payments "was based [solely] on the refusal to recognize and bargain with the Union, part of the appropriate remedy was to" require respondent "to 'honor' the contract" by paying fringe bene-

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to reinstate three employees which occurred more than six months before they filed charges violated the Act. The court declined to hold that that failure constituted a continuing violation making a subsequent refusal to reinstate the employees within the six month period unlawful. *Cf. American Federation of Grain Millers* v. *N.L.R.B.*, 197 F.2d 451 (C.A. 5). Since there was no independent evidence that the subsequent refusal to reinstate was discriminatory, a finding that Pennwoven violated the Act would necessarily have been based upon a determination that the earlier failure to recall violated the Act, a finding barred by Section 10(b). Here, the Board's order is based upon respondent's April 1964 refusal to sign the contract. The lawfulness of that refusal does not depend upon a finding that any other conduct of respondent violated the Act, but only upon a finding that respondent was a member of the Association in April 1964.

fits due under it. *N.L.R.B.* v. *Gene Hyde, supra,* 339 F. 2d at 572.[13] See *H. J. Heinz Co.* v. *N.L.R.B.*, 311 U.S. 514. Indeed, those payments are essential to restore to respondent's employees a benefit which they would have received but for respondent's unfair labor practice. Thus, the Board's order restores "the situation, as nearly as possible, to that which would have obtained but for the [unfair labor practice]", *Phelps-Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 194. See also *N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 352; *N.L.R.B.* v. *Mackay Radio Co.*, 304 U.S. 333, 348; *N.L.R.B.* v. *Gene Hyde, supra,* and "prevents the violator from benefitting by his misdeed." *N.L.R.B.* v. *J. H. Rutter Rex Mfg. Co.*, 245 F. 2d 594 (C.A. 5).[14]

Respondent argued to the Board that it was deprived of due process by the Examiner's imposition of a fringe benefit payment remedy which the General Counsel had not requested. But the Board is free to order a remedy, which the General Counsel has not

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[13] Since respondent does not contest its liability for fringe benefits, given its obligation to honor the contract, no question of contract interpretation is involved. Compare *N.L.R.B.* v. *C. & C. Plywood Corp.*, 351 F. 2d 224 (C.A. 9), cert. granted, 34 U.S. L. Week 3356 (U.S. April 18, 1966) (No. 884).

[14] Respondent's discontinuance of fringe benefit payments rested on its view that it was not bound by the contract because it had no obligation to bargain with the Union. Where an employer discontinues benefits without bargaining with the employees' statutory representative, the Board, with court approval, has ordered the benefits restored. See, e.g., *N.L.R.B.* v. *Central Ill. Public Service Co.*, 324 F. 2d 916, 918-919 (C.A. 7) The situation here is analogous, we submit.

requested. See *N.L.R.B.* v. *Midwest Transfer Company of Ill.*, 287 F. 2d 443, 446 (C.A. 3); *Stewart Die Casting Corp.* v. *N.L.R.B.*, 114 F. 2d 849, 856-857 (C.A. 7). *Cf. N.L.R.B.* v. *Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 348-349. And respondent could and did argue that the proposed remedy was inappropriate in its brief and exceptions to the Board, but it alleged no facts which would have warranted further hearing. Consequently, it was not deprived of an opportunity to challenge the propriety of the order and was not entitled to a hearing. Cf. *Fay* v. *Douds*, 172 F. 2d 720, 722 (C.A. 2); *N.L.R.B.* v. *O. K. Van Storage Co.*, 297 F. 2d 74 (C.A. 5).

Respondent also contended that the Board's order grants the benefit funds a windfall, since respondent's employees were not union members. But that argument assumes that the fringe benefit funds provided for in the contract make payments only to union members, in violation of the National Labor Relations Act. See *N.L.R.B.* v. *Local 815, International Brotherhood of Teamsters*, 290 F. 2d 99 (C.A. 2). There is no warrant for that assumption in the record,[15] and respondent did not offer to prove that fund benefits were payable only to union members.[16]

---

[15] The record shows (GC Exh. 4, Art. XI D., p. 18) that payments must be made "for all hours worked by *all* employees of the signatory Contractor covered by this agreement." (Emphasis supplied).

[16] In its answer to the petition for enforcement, respondent contends that the order requiring payment of fringe benefits is unlawful because the fund is unlawful under Section 302 of the Act. This defense was not raised before the Trial Examiner or in respondent's exceptions to the Board. Section

Respondent's further contention that the Union's dilatory tactics led respondent not to pay the fringe benefits and therefore make the Board's order inappropriate, ignores the Union's repeated attempts to have respondent sign the contract, beginning in October just before respondent ceased to pay benefits. Finally, respondent argued that the remedy is inappropriate because it requires respondent to pay fringe benefits accruing more than six months before the charge was filed and before respondent committed the unfair labor practice found. But respondent, had it signed and honored the contract in April 1964, would have been obliged to make payments for the months in which it was delinquent. Hence, the Board's order restores the status quo as it would have existed as of April 1964, and compels respondent to do what it should have done on that date. Section 10(b) is not

---

10(e) of the Act provides, in pertinent part, that "no objection that has not been urged before the Board, its member, agent or agency, shall be considered by the Court, unless the failure or neglect to do so shall be excused because of extraordinary circumstances." See, e.g., *Marshall Field & Co.* v. *N.L.R.B.*, 318 U.S. 253; *N.L.R.B.* v. *Giustina Bros. Lumber Co.*, 253 F. 2d 371, 374 (C.A. 9). Consequently, respondent is precluded from urging the illegality of the funds as a ground for reversal

In any event, respondent's objection is without merit. Section 302(c)(2) excludes from the prohibition of Section 302 "any satisfaction of a judgment of any court . . . ." And Section 302(c)(5) excludes payments made to trust funds "for the sole and exclusive benefit of the employees of such employer." Respondent has not shown that the benefits provided for in the agreement fail to qualify for this exception. Absent evidence, we submit, this Court should not presume that a contract provision lawful on its face, is in fact unlawful. *Cf. N.L.R.B.* v. *News Syndicate Co.*, 365 U.S. 695, 699.

a limitation on the Board's remedial power, but on its power to issue a complaint. Section 10(b)'s purpose is to prevent findings of violations of the Act from being based upon "stale" charges. See *Local 1424, IAM* v. *N.L.R.B.*, 362 U.S. 411, 427. That purpose is not offended where the Board takes note of undisputed facts (here the date of the agreement) to determine an appropriate remedy. Accordingly, the remedy is appropriate.

CONCLUSION

For the foregoing reasons, we respectfully request that the Board's order be enforced in full.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

GEORGE B. DRIESEN,
BURTON L. RAIMI,
Attorneys,

National Labor Relations Board.

June 1966.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

DEFINITIONS

Sec. 2 When used in this Act—

* * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * *

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a

labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * *

Sec. 8 (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination

or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of

the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of section 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

* * * *

REPRESENTATIVES AND ELECTIONS

Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

* * * *

Sec. 10(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have

power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon.

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and

for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

* * * *

SUITS BY AND AGAINST LABOR ORGANIZATIONS

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizatons, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district court shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal offices, or (2) in any district in which is duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Restrictions on Payments to Employee Representatives

Sec. 302. (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect

to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or the connection with the unloading, of the cargo of such vehicle: *Provided,* That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of

a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the em-

ployers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; or (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training program: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 17 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U.S.C., title 28, sec. 381), to restrain violations of this section, without regard to the provisions of sections 6 and 20 of such Act of October 15, 1914, as amended (U.S.C., title 15, sec. 17, and title 29, sec. 52), and the provisions of the Act entitled "An Act to amend the judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U.S.C., title 29, secs. 101-115).

(f) This section shall not apply to any contract in force on the date of enactment of this Act, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c)(5)(B) upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

APPENDIX B

Pursuant to the Rule 18(f) of the Rules of the Court:

GENERAL COUNSEL'S EXHIBITS

No.	Identified	Offered	Received
1(a) - 1(f)	4	4	5
2	11	12	12
3	14	15	15
4	16	16	16
5(a) and 5(b)	38	39	39
6	82	87	—

RESPONDENT'S EXHIBITS

No.	Identified	Offered	Received
1	24-25	24-25	25
2	63	63	65
3	66	66	66

TRIAL EXAMINER'S

No.	Identified	Offered	Received
1	71	71	71

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 219960 865

NO. 20,762

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

JOSEPH T. STRONG d/b/a
STRONG ROOFING & INSULATING CO.,

Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board

---

RESPONDENT'S BRIEF

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Subject Index

Table of Authorities Cited

Statutes

Texts

NO. 20,762

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---

RESPONDENT'S BRIEF

Preliminary Statement

This is a proceeding, pursuant to Section 10 (e) of the National Labor Relations Act, as amended, in which the National Labor Relations Board is seeking to enforce its order (R 18-19, 31)* against Joseph Strong d/b/a

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* References designated "R" are to volume 1 of the record herein. References designated "Tr" are to the reporter's transcript of the testimony as reproduced in volume 2 of the record. References designated "GC Exch.," "R. Exh.," or "TX Exh." are to exhibits of the General Counsel, Respondent, and Trial Examiner, respectively.

Strong Roofing and Insulating Company (referred to herein as "Respondent"), issued on April 22, 1965, and reported at 152 NLRB No. 2. The proceedings before the Board were initiated by the filing of an unfair labor practice charge with the Board on June 3, 1964, by Roofer's Local 36, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association (referred to herein as the "Union"). (R 3, 12, 13) In the proceedings before the Board Respondent contended that the complaint was barred by Section 10 (b) of the Act in view of the fact that the charge was filed more than six months after Respondent had advised the Union of its refusal to sign a multi-employer contract, and that if the Board did determine the merits of the complaint, it should find that the Union, by its conduct during the period in question, had waived any right it may have had to require Respondent to sign the multi-employer contract (R 13, 17). The Board adopted without opinion the conclusions of its Trial Examiner that the proceedings was not barred by Section 10 (b) and that by refusing to sign the multi-employer contract, Respondent had violated Sections 8 (a) (1) and 8 (a) (5) of the Act.

Respondent is submitting the following statement of facts which includes certain facts found by the Trial Examiner and adopted by the Board or uncontradicted in the record which were not included in the statement of facts in the Board's brief.

Statement of Facts

Respondent with the assistance of his wife operated a small roofing contracting business in Alhambra, Cali-

fornia (Tr 59, 84; GC Exh. 5a). From 1949 to August 1963, Respondent employed members of the Union and said employees were covered by multi-employer contracts between the Union and the Roofing Contractors Association of Southern California (referred to herein as the "Association"), of which Respondent was a member (Tr 61).

Negotiations for the most recent contract commenced in March, 1963, and terminated on August 14, 1963 (Tr 16). Respondent's only knowledge of the negotiations was through bulletins received from the Association (Tr 68-69). In view of the small local nature of his business and the number of non-union competitors, Respondent decided to withdraw from the multi-employer unit (Tr 52). On August 20, 1963, he wrote the following letter to the Joint Labor Relations Board:

> "Persuant [sic] of that Artle [sic] in the Master Agreement dated August 15, 1963; to and including August 15, 1967; pertaining to the termination of the Master Contract, I, J. T. Strong d.b.a. as the Strong Roofing & Insulation Company, located at 710 South Garfield Avenue, Alhambra; request action in accordance with the above noted Article the current Master agreement. [sic].
>
> "Date of termination to be set at next regular meeting of the J.L.R.B., who shall release depost [sic] of $400.00 held as guarantee of faithful performance regarding labor payments as so described in Master Agreement." (R 15)

The Joint Labor Relations Board is composed equally of Union and employer representatives and was established to administer the collective bargaining agreement. (R 15; Tr 21) In view of the fact that no issue was raised to the contrary, the Trial Examiner found that this letter was sent to the proper party. (R 15) The Union and employer representatives on the Joint Labor Relations Board referred the matter to the executive secretary of the Association who granted the requests set forth in the letter of August 20, 1963, by changing Strong's status from a regular to an associate (non-union) member of the Association and by returning the $400.00 deposit held as a guarantee of the payments required by the contract between the Union and the Association. (Tr 23, 24, 70-72)

During the period between August 14, 1963, when the terms of the contract were agreed upon and June 3, 1964, when the instant charge was filed, the Union communicated with Respondent with respect to the contract on only three occasions. (Tr 51, 52, 72-75, 90-93) Mr. Sheridan, the Union representative assigned to the geographical district in which Respondent's business is located (Tr 43), visited Respondent's office on October 18 or October 20, 1963, and talked to Respondent's wife, requesting that Respondent sign the new contract. (Tr 90-91) Respondent's wife advised Mr. Sheridan that Respondent had indicated that for economic reasons he could not execute the contract. Sheridan, instead of advising Mrs. Strong that Respondent was required to execute the agreement, stated, "I hate to see you drop out," and Mrs. Strong replied, "We hate to drop out." (Tr 91)

Sheridan returned on approximately December 10, 1963, and stated that if Respondent did not sign the contract he would have to pull the Union men off the job. Respondent's wife advised him that the Union men were leaving to start their own business and that her husband was unable to execute and operate under the Union contract. Sheridan again did not contend that the Union considered Respondent bound by the agreement, but remained to join Mrs. Strong and others in the office for coffee, giving Respondent no grounds for believing that the Union was challenging his withdrawal from the multi-employer unit. (Tr 92-93)

Subsequent to the second conversation between Sheridan and Mrs. Strong, there was no further communication between the Union and Respondent until April, 1964, when a representative of a union representing employees at a plant where Respondent was repairing certain portions of the roof advised Respondent of a possible picket line because Respondent was non-union. (Tr p. 74) Respondent referred the representative of plant union to the Union and subsequently Union representative Nuttall visited Respondent's office and Respondent explained the reasons why Respondent could not sign the contract. (Tr p. 52, 72-73) At no time during this conversation did Mr. Nuttall state that the Union was taking the position that Respondent was legally required to sign the contract. (Tr p. 73)

Respondent received no further communication from the Union until the instant unfair labor practice charge was filed with the Board on June 3, 1964.

Questions Presented

Question No. 1: Was the Board precluded by Section 10 (b) of the Act from issuing and determining the complaint herein in view of the fact that the underlying unfair labor practice charge was filed more than six months following Respondent's refusal to execute the multi-employer contract?

Question No. 2: Was the Union estopped by its conduct during the period August, 1963, to June 3, 1964, from contending that it did not consent to the Respondent's withdrawal from the multi-employer unit and release from the obligations of the multi-employer contract?

Question No. 3: Did the Board err in including in its order a requirement that Respondent pay to the appropriate source any fringe benefits provided for in the multi-employer contract?

Summary of Argument

Respondent's argument will be directed to each of the three issues set forth in Questions Presented.

First, the underlying unfair labor practice charge was barred by Section 10 (b) of the Act. An agreement was reached on the multi-employer contract on August 14, 1963. On October 18, or 20, 1963, Respondent unequivocally advised the Union of his refusal to sign the agreement. At this point Respondent's unfair labor practice was complete and the charge should have been filed no later than six months following said unequivocal refusal to sign the contract. Court and Board decisions support

this position of Respondent. Cases cited by the Board pertain to instances where a separate unfair labor practice occurred during the six month limitation period rather than the reaffirmation of the previous unfair labor practice barred by Section 10(b). The effect of the Board's argument is to permit the limitation period to run indefinitely, a result which has never been permitted by the courts. Finally, Section 10(b) was intended to operate as a general statute of limitations and applying principles applicable to such statutes, the Court should find that the limitation period expired prior to the filing of the charge.

Second, although Respondent's attempted withdrawal from the multi-employer unit by his letter dated August 20, 1963, may have been untimely, the following course of conduct pursued by the Union subsequent to receipt of said letter requires the conclusion that Respondent was justified in believing that the Union had consented to the withdrawal from the unit and release from the obligations of the contract: the absence of a negative response to Respondent's letter of August 20, 1963; the return of the deposit guaranteeing Respondent's performance of the obligations of the multi-employer contract; the statements of Union representatives in the three meetings between the Union and Respondent or his wife during the period in question; and the unexplained failure of the Union to promptly enforce payment of fringe benefits required by the contract.

Third, the portion of the order requiring Respondent to pay fringe benefits was an abuse of the Board's discretion because: this remedy was not requested by the Gen-

eral Counsel at the hearing; there is no showing Respondent's non-union employees were adversely affected; the Union's conduct was dilatory and lethargic; and the remedy was punitive since there is no showing that Respondent would have been awarded particular jobs if his bid was based on the fringe benefit payments required by the contract.

ARGUMENT

I. THE BOARD WAS BARRED BY SECTION 10(b) FROM ISSUING AND DETERMINING THE COMPLAINT HEREIN BECAUSE THE UNDERLYING CHARGE WAS FILED MORE THAN SIX MONTHS FOLLOWING RESPONDENT'S INITIAL REFUSAL TO SIGN THE MULTI-EMPLOYER CONTRACT.

By including the following proviso in Section 10(b) of the Act, Congress conditioned the use of the Board's facilities and reliance upon rights granted by the Act upon the prompt and diligent exercise of such rights:

> "Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board. . . ."

The unfair labor practice found by the Board to have been committed by Respondent was the violation of Sections 8(a)(1) and 8(a)(5) by refusing to sign the multi-employer contract. In order to establish such a violation the Board must show three essential elements: a duty to sign; a demand; and a refusal. In the instant case the duty to sign was based solely on the claim that Respondent was still a member of the Association on August 14, 1963, when the four year contract, effective August 15, 1963 was agreed upon between the Association and the Union. On October 18, 1963, the Union demanded that Respondent execute the contract and Respondent refused said demand. At this point all three essential elements of the unfair labor practice — the duty to bargain, the de-

mand, and the refusal — were present and the unfair labor practice was complete. Since the underlying charge, on which the complaint in this case was issued, was not filed until June 3, 1964, more than six months later, the complaint was barred by Section 10(b). *Local Lodge No. 1424, International Association of Machinists, AFL-CIO, et al. v. NLRB (Bryan Manufacturing Company,* 362 U.S. 411 (1960); *Gulfcoast Transit Company v. NLRB,* 322 F.2d 28 (CA 5, 1964); *NLRB v. Brown,* 310 F.2d 539 (CA 9, 1962); *American Federation of Grain Millers, AFL v. NLRB,* 197 F.2d 451 (CA 5, 1952); *NLRB v. Pennwoven, Inc.,* 194 F.2d 521 (CA 3, 1952); *Marcus Trucking Company,* 126 NLRB 1080, 1092-1093 (1960); *Knickerbocker Manufacturing Company,* 109 NLRB 1195 (1954); *Bonwit Teller, Inc.,* 96 NLRB 608 (1951); *Greenville Cotton Oil Company,* 92 NLRB 1033 (1950).

The Board argues that the refusal to sign the contract in April, 1964, constituted a separate unfair labor practice and consequently the charge filed on June 3, 1964, was not barred by Section 10(b). (Board brief, pp. 14-15) Although there are no court or Board decisions interpreting Section 10(b) as applied to a refusal to sign a multi-employer contract, an analysis of the applicable court and Board decisions requires a conclusion that the charge in the instant case was barred by Section 10(b).

In *Local Lodge No. 1424, International Association of Machinists, AFL-CIO, et al. v. NLRB (Bryan Manufacturing Company),* 362 U.S. 411 (1960), the Supreme Court rejected a Board contention that an unfair labor practice which had commenced more than six months

prior to the filing of a charge could still be the subject of a complaint since it was continuing within the six month period. In that case the Board held that the enforcement of an otherwise valid collective bargaining agreement between an employer and a union violated the Act because the agreement was executed at a time when the union did not represent a majority of the employees in the unit. In its argument to the court the Board conceded that the execution of the unlawful minority agreement was barred by Section 10(b) but contended that its complaint was based upon the parties' continued enforcement of the agreement within the limitation period. The court analyzed the purpose and effect of Section 10(b) and concluded that:

> ". . . the entire foundation of the unfair labor practice charge was the union's time-barred lack of majority status when the original collective bargaining agreement was signed. In the absence of that fact, enforcement of this otherwise valid union security clause was wholly benign."
> (362 U.S. at 417)

In the instant case the entire foundation of the unfair labor practice charge is the refusal to sign the contract. This refusal was communicated to the Union no later than October 18 or 20, 1963, and the six month period of limitation should be deemed to have commenced at that point. The refusal to sign in April, 1964, was entirely lawful without reference to the events occurring outside the six month period.

NLRB v. Pennwoven, Inc., 194 F.2d 521 (CA 3, 1952), also requires the conclusion that the complaint

herein is barred by Section 10(b). Recognizing that the employer had unlawfully discriminated against three employees in refusing to hire them following a strike, the court in *Pennwoven* held that the complaint was barred by Section 10(b) because the initial refusal to hire occurred nine months prior to the filing of the charge *even though the employer reaffirmed its position by refusing reinstatement requests shortly prior to the filing of the charge.* As in the instant case the Board argued that since the unlawful refusal was repeated within the six month period, the violation should be regarded as a continuing one and Section 10(b) should not be construed as barring the issuance of the complaint. The court rejected this argument because the basic unfair labor practice was the initial refusal to rehire and the subsequent refusal was merely a reaffirmation of the allegedly unlawful position previously taken. Similarly, in the instant case the refusal to sign the contract in April, 1964, was merely a reaffirmation of the position communicated to the Union in October, 1963.

The reasoning of the *Local Lodge 1424, International Association of Machinists* and *Pennwoven* cases was accepted by this Court in *NLRB v. Brown,* 310 F.2d 539 (CA 9, 1962), in rejecting the Board's contention that the continuance in existence of an allegedly unlawfully dominated company union was a proper basis for a complaint even though the unlawful domination of the company union occurred more than six months prior to the filing of the charge. See also *Gulfcoast Transit Company v. NLRB,* 332 F.2d 28 (CA 5, 1964).

Other decisions supporting Respondent's position that the six month limitation period in Section 10(b) commenced to run at the time of the *initial* refusal to sign are: *Marcus Trucking Company, Inc.*, 126 NLRB 1080, 1092 (1960), and *Goodall Company*, 86 NLRB 814, 844 (1949) (Board held that charges alleging the invalidity of a new salary plan and a wage increase, respectively, were barred *since the initiation of the plan and increase occurred more than six months prior to the filing of the charge* even though said plan and increase were still in effect during the six month period) and *Bonwit Teller, Inc.*, 96 NLRB 608, 610 (1951), enf. denied on other grounds, 197 F.2d 640 (CA 2, 1952), cert. denied, 345 U.S. 905 (1953) (Board held that a charge directed against an unlawful policy of withholding individual wage reviews and increases during a union organizing drive was barred by Section 10(b) *where the policy was initiated prior to the six month period* even though the policy was continued in effect during the six month period).

In support of its position that Respondent's violation was of a continuing nature which extended into the six month period, the Board cited *NLRB v. White Construction and Engineering Co., Inc.*, 204 F.2d 950 (CA 5, 1953), and *NLRB v. Local 269, International Brotherhood of Electrical Workers, AFL-CIO*, 357 F.2d 51 (CA 3, 1966). Both of these cases are distinguishable on their facts from the instant case. In *White Construction and Engineering Co., Inc.*, cited on page 14 of the Board's brief, the union was certified as bargaining representative of the employer's employees in December and the employer immediately refused to bargain. The charge

was not filed until the following July but the court concluded that because of the certification the duty to bargain extended for a reasonable period of time.* Since the employer had repeatedly refused the union's demands to bargain made subsequent to December and within the six month period while the duty to bargain under the certification was still in force, the court concluded that the complaint was not barred by Section 10(b) of the Act.

The duty to bargain which arises from a certification must by its nature be regarded as a continuing duty which extends for a period of time. The rationale behind extending such a duty is that since the employees have selected the union as their collective bargaining representative, the union is entitled to a period of time in which to establish a bargaining relationship during which time the employer cannot arbitrarily refuse to bargain. There is no such rationale, however, for construing the duty to sign a multi-employer contract as being a continuing duty. The duty to sign a multi-employer contract is a fixed obligation the breach of which should immediately commence the six months limitation period to run, just as the execution of an otherwise lawful minority contract or the initial discriminatory refusal to rehire have been found to commence the six month period to run. *Local Lodge 1424, International Association of Machinists v. NLRB,* supra; *NLRB v. Pennwoven, Inc.,* supra.

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* The Supreme Court subsequently sustained the Board's rule that a union's majority status could not be challenged for one year following certification. *Ray Brooks v. NLRB,* 348 U.S. 96 (1954).

NLRB v. Local 269, International Brotherhood of Electrical Workers, AFL-CIO, supra, cited on page 15 of the Board's brief, also involved a current violation during the six month period. In that case an illegal hiring clause had been executed prior to the six month period but during the six month period the illegal clause had been applied in a discriminatory manner as distinguished from the *Local Lodge 1424, International Association of Machinists* case where the unlawful executed contract was validly applied during the six month period. In the instant case the refusal in April, 1964, to sign the contract should be considered as a reaffirmation of the earlier refusal and not as an independent violation as the discriminatory application of the hiring clause was found to be in the *Local 269, International Brotherhood of Electrical Workers, AFL-CIO* case.

Moreover, the effect of the Board's argument is to entirely remove the protection of the limitation period in Section 10(b) from a refusal to sign a multi-employer contract under circumstances similar to those in the instant case. Under the Board's argument, the Union could at any time during the term of the four year contract or even subsequent thereto demand that Respondent sign the 1963-1967 contract and the refusal to sign would constitute a separate unfair labor practice. Congress obviously did not intend to permit Section 10(b) to be so easily circumvented by making subsequent demands. The Board's argument is comparable to its argument in *Local Lodge 1424, International Association of Machinists, AFL-CIO v. NLRB (Bryan Manufactur-*

ing Company), supra, where the Supreme Court observed that:

> "It is apparently not disputed that the Board's position would withdraw virtually all limitations protection from collective bargaining agreements attacked on the ground asserted here. For, once the principle on which the decision below rests is accepted, so long as the contract — or any renewal thereof — is still in effect, the six-month period does not even begin to run."
> (362 U.S. at 425)

On the other hand, applying the Board's argument to the two cases cited in its brief, *NLRB v. White Construction and Engineering Co., Inc.*, supra, cited on page 14 of the Board's brief, and *NLRB v. Local 269, International Brotherhood of Electrical Workers,* supra, cited on page 15 of the Board's brief, the six month period would ultimately commence to run in those cases without being subject to renewal by subsequent demands. In the *White Construction and Engineering Co., Inc.* case, when a reasonable period of time following certification had elapsed the six month period would commence to run and, once it had commenced the employer's liability could not be renewed by a further demand to bargain. Similarly, in the *Local 269, International Brotherhood of Electrical Workers* case, the sixth month period would commence to run as soon as the union ceased its unlawful hiring practices and the union's liability could not be renewed by a further demand.

Finally, as observed by Chief Judge Biggs in his concurring opinion in the *Pennwoven* case, supra, 194 F.2d

521, 526, Section 10(b) "is phrased like the typical statute of limitations and was obviously intended by Congress to operate as such." Whether Respondent's refusal to sign the multi-employer contract be regarded as constituting a tort or a breach of contract, it is well established that the statute of limitations commences at the time the contract was initially repudiated or the tort initially committed. 34 Am. Jur. Limitation of Actions §137, pp. 110-111; §160, pp. 126-127 (1941).

On the basis of the foregoing authorities and arguments, this Court should find that the issuance of the complaint herein was barred by Section 10(b) and that enforcement of the Board's order must therefore be denied.

II. THE UNION WAS ESTOPPED BY ITS CONDUCT DURING THE PERIOD AUGUST 20, 1963, TO JUNE 3, 1964, FROM CONTENDING THAT IT DID NOT CONSENT TO RESPONDENT'S WITHDRAWAL FROM THE MULTI-EMPLOYER UNIT AND RELEASE FROM THE OBLIGATIONS OF THE MULTI-EMPLOYER CONTRACT.

Respondent's basic contention with respect to the merits of the charge that he violated Sections 8(a) (1) and 8(a) (5) of the Act by refusing to sign the multi-employer contract is that the Union, by its conduct between the receipt of Respondent's letter of August 20, 1963, to the Joint Labor Relations Board and the filing of the charge on June 3, 1964, consented to Respondent's withdrawal from the multi-employer unit and release from

the obligations of the multi-employer contract. As the Board has recognized on page 12 of its brief, an employer's withdrawal from a multi-employer unit is effective if the union consents to the employer's withdrawal even where such withdrawal would have been untimely. *C & M Construction Co.,* 147 NLRB 843, 845-846 (1964); *Metke Ford Motors, Inc.,* 137 NLRB 950 (1962).

An evaluation of the record in the instant case can lead to no other conclusion than that Respondent was justified in believing that the Union was consenting to his withdrawal. First, substantial significance must be accorded to Respondent's letter of August 20, 1963, in which he notified the Joint Labor Relations Board of his desire to terminate the new contract and requested return of the deposit posted to insure compliance with the contract. Although this letter was sent to the Joint Labor Relations Board rather than the Union, the Joint Labor Relations Board consisted of an equal number of representatives of both the Association and the Union and the Trial Examiner's finding that the letter was sent to the proper party was adopted by the Board. (R 15, 31) The Union not only did not immediately respond to the letter of August 20, 1963, by advising Respondent that the Union would consider him legally obligated by the 1963 contract and refusing his request to withdraw from the unit and have the deposit returned but made no response at all and delegated the matter to the executive secretary of the Association who returned Respondent's deposit and changed his membership status in the Association. (Tr 23, 24).

Neither the Trial Examiner nor the Board attached the proper significance to the return of the deposit. The Trial Examiner concluded that the deposit was returned too late to constitute consent. (R 17) However, as conceded by the Board on page 12 of its brief, an employer can withdraw at any time from a multi-employer unit with the consent of the Union and the other employers in the unit. Moreover, the return of the deposit occurred at a critical point following Respondent's unequivocal communication to the Union that he would not sign the new contract. The return of the deposit compounded by the Union's failure to advise Respondent of his position that it considered him bound by the contract could only be regarded by a reasonable man in Respondent's position as indicating consent of the Union to Respondent's withdrawal from the unit and release from the obligations of the contract. Although the Board in a footnote on page 13 of its brief contends that the record does not show that the Union acquiesced in the return of the deposit by the Association, this argument ignores the fact that the Union members on the Joint Labor Relations Board, which was found by the Trial Examiner to constitute the proper party to receive Respondent's letter of withdrawal, delegated action on the letter and deposit to Mr. Baier, then the executive director of the Association. Under these circumstances both the Union and the Association were bound by Mr. Baier's action in returning the deposit.

The Union's response to Respondent's letter of August 20, 1963, is in direct contrast to the response of the union in *Spun-Jee Corp.*, 152 NLRB No. 96, 59 LRRM 1206 (1965), where the union, upon receiving a letter from

the employer to the effect that the employer was withdrawing from the multi-employer unit, immediately replied that the union would take the position that the employer could not withdraw from the multi-employer unit and was bound by the multi-employer contract.

In addition to the Union's failure to object to Respondent's letter of August 20, 1963, and its failure to advise the Association not to return the deposit as requested by Respondent the only meetings between Respondent and the Union are devoid of any statement or other indication by the Union that it considered the Respondent to be bound by the multi-employer contract. In the first meeting between Union representative Sheridan and Mrs. Strong on October 18, Sheridan's response to Mrs. Strong's statement that Respondent was withdrawing from the multi-employer unit was "I hate to see you drop out," and Mrs. Strong replied that "They hated to drop out." On the basis of this exchange the Union had been clearly advised of Respondent's intention not to sign the contract. The response "I hate to see you drop out" must be regarded under these circumstances as indicating a reluctant agreement on the part of the Union to Respondent's withdrawal from the multi-employer contract.

In the second meeting in December, 1963, Sheridan again requested that Respondent sign the contract but when advised that Respondent was still retaining its earlier position, Sheridan made no objection and joined Mrs. Strong and others for coffee.

During their meeting in April, 1964, Union representative Nuttall gave Respondent no reason to believe

that the Union was considering him bound by the multi-employer contract. Nuttall, who was assigned to the geographical district where Respondent was repairing a roof and was not the Union representative assigned responsibility for Respondent's operation, requested that Respondent sign the contract in a manner similar to that in which a request was made by a Union representative in 1949 when Respondent was first asked to sign the multi-employer contract. (Tr 60-61) Respondent could reasonably conclude from this conversation that Nuttall was simply attempting to induce a non-union contractor to sign the contract.

The mere fact that Respondent had been president of the Association several years previously is not a sufficient basis for an inference that he was, therefore, familiar with rules regarding the legal effect of the multi-employer contract and withdrawal from the multi-employer bargaining unit. The Constitution and By-laws of the Association demonstrate that there are many other purposes and functions of the Association which are not related to labor relations. (GC Exh 2, Articles II, X) The labor relations and negotiations were conducted by a separate labor committee and there is no showing that Respondent was a member of such separate committee or that he was familiar in any way with labor relations matters. Indeed, the language in Respondent's letter of August 20, 1963, and his explanation to the Trial Examiner as to his understanding of the effect of the termination clause in the contract demonstrates conclusively that Respondent had little, if any, understanding of basic labor relations concepts and in particular rules governing

interpretation of collective bargaining contracts and the withdrawal of employers from a multi-employer unit. (Tr 68-70)

Finally, the failure of the Union to require that Respondent pay fringe benefits is further evidence that the Union did not consider Strong bound by the contract. On at least two occasions the Union had acted swiftly when Respondent failed to pay fringe benefits as required. (Tr 75-76, 78, 89) In contrast, in the instant case the Union took no action at all and thus gave Respondent further grounds for believing that he had been relieved from the obligations of the contract.

In determining that the Union did not consent to Respondent's withdrawal and release from the obligations of the contract, the Board evaluated the totality of the Union's conduct in a mechanical and unrealistic manner. Viewing all these facts as a whole: the absence of a negative response to the letter of August 20, 1963, and the return of the deposit; the equivocal statements by Sheridan in his two meetings with Mrs. Strong; the failure of Nuttall to set forth the Company's position in his meeting held pursuant to Strong's invitation and the unexplained change in the Union's strictly enforced policy of promptly requiring payment of fringe benefits, a reasonable man in respondent's position, unversed in the technicalities of labor relations law, could only conclude that the Union was releasing him from the obligations of the multi-employer contract.

Accordingly, on the basis of the foregoing, this Court should conclude that even if the underlying charge was

not barred by Section 10(b), the complaint should have been dismissed by the Board on the ground that the Union by its conduct waived any right it may have had to require Respondent to sign the contract.

III. THE BOARD ERRED IN INCLUDING IN ITS ORDER A REQUIREMENT THAT RESPONDENT PAY TO THE APPROPRIATE SOURCE ANY FRINGE BENEFITS PROVIDED FOR IN THE MULTI-EMPLOYER CONTRACT.

The traditional remedy which the Board has applied in cases where it has found that an employer violated Sections 8(a) (1) and 8(a) (5) of the Act in refusing to sign a multi-employer contract has been to direct the employer to sign the contract. *Universal Insulation Corporation,* 149 NLRB 262 (1964) enf'd. 361 F.2d 406 (C.A. 6, 1966); *Sheridan Creations, Inc.,* 148 NLRB 1503 (1964) enf'd. 357 F.2d 245 (C.A. 2, 1966;) *Anderson Lithograph Company, Inc.,* 124 NLRB 920 (1959) enf'd. sub nom *NLRB v. Jeffries Banknote Co.,* 281 F.2d 893 (C.A. 9, 1960).

In *Gene Hyde d/b/a Hyde's Supermarkets,* 145 NLRB 1252 (1964) enf'd. 339 F.2d 568 (C.A. 9, 1965), the Trial Examiner, in addition to directing the employer to sign the agreement, included a requirement that the employer honor the agreement and comply with the provisions thereof. The Board deleted the direction to "comply with the provisions of the collective bargaining agreement" on the ground that the enforcement of the terms of a collective bargaining agreement is for the courts rather than the Board but did include in its order the

direction that the employer "honor" the agreement and this order was enforced by this Court.

Following the *Hyde* case, the Board, in certain cases, has commenced to direct employers to give retroactive effect to collective bargaining contracts. In one of the first cases in which this remedy was directed, *Ogle Protection Service, Inc.,* 149 NLRB 545 (1964), the Trial Examiner had refused the General Counsel's request that the contract be performed retroactively and employees receive back pay. The Board found merit in the General Counsel's exception to the Trial Examiner's failure to direct retroactive application of the contract and amended the order requiring that retroactive effect be given to the contract.

It is submitted that enforcement of collective bargaining contracts should be reserved for the courts rather than the Board. In any event, the record in this case demonstrates that regardless as to whether such a remedy might be appropriate in other cases, the direction of such a remedy against Respondent was an abuse of the Board's discretion.

First, in this case the General Counsel did not as he did in *Ogle Protection Service, Inc.,* supra, request an affirmative remedy such as the payment of fringe benefits. Therefore, until the issuance of the Trial Examiner's decision the Respondent had no indication that the question of an issuance of an affirmative remedy was an issue in this case. As a matter of basic due process, the Respondent should have been advised of the Board's intention to request such remedy so that it could have

been in a position to submit evidence showing the inappropriateness of such a remedy.

Second, this is not a situation as in *Ogle* where an employer is reneging on an agreement to grant certain wage increases and fringe benefits to his employees. In the instant case, although the record was not fully developed on this issue in view of the General Counsel's failure to request the affirmative remedy, it is apparent that Respondent hired new employees and presumably advised them of their specific terms and conditions of employment so that before the employees were placed on the active payroll they were aware of the fact that the terms and conditions of their employment would not be based upon the multi-employer contract. (Tr 69, 92) The employees themselves, therefore, are not affected by the remedy since they were employed with the understanding that the multi-employer contract would not be applicable. With respect to the status of the Union it is apparent that the Union's conduct in this case was exceptionally dilatory and lethargic and there is no evidence in the record which would indicate that the Board should exercise its remedial powers to require payment of funds to the Union. The Union on and after October 18 or 20, 1963, could have taken steps, as it had in the past, to insure payment of the fringe benefits and compliance with the union security provision and the other provisions in the multi-employer contract. (Tr 75-76, 78, 89)

Moreover, the remedy is punitive rather than remedial in nature as there is no basis in the record for inferring that Respondent could have obtained any or all of the

jobs on which his employees worked subsequent to the date Respondent ceased payment of fringe benefits. If Respondent has based his bids on the fringe benefit payments specified in the contract, he might not have received the jobs. Consequently, under the Board's order Respondent is being required to make payments which in fact he may not have had to make if he had signed and complied with the contract.

It should also be noted that the Board issued an affirmative remedy requiring the payment of fringe benefits beyond the six month period immediately prior to the filing of the charge. Presumably under the Board's theory in this case it could at any time have issued a complaint on the basis of a further demand within six months of the filing of the charge and ordered the payment of fringe benefits to be retroactive for the entire contract. Such a position is not only proscribed by Section 10(b) but is patently unfair and unjust.

It is therefore submitted that in the event this Court does find that Respondent did violate Sections 8(a)(1) and 8(a)(5) of the Act by refusing to sign a multi-employer contract enforcement of that portion of the Board's remedy requiring payment of fringe benefits to appropriate sources should be denied.

Conclusion

On the basis of the foregoing, enforcement of the Board's order against Respondent should be denied.

Respectfully submitted,

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Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

ALFRED C. PHILLIPS

No. 20,762

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

JOSEPH T. STRONG d/b/a STRONG ROOFING & INSULATING CO., RESPONDENT

PETITION FOR REHEARING *EN BANC*

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NATIONAL LABOR RELATIONS BOARD, PETITIONER

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JOSEPH T. STRONG d/b/a STRONG ROOFING & INSULATING CO., RESPONDENT

PETITION FOR REHEARING *EN BANC*

The National Labor Relations Board petitions for rehearing *en banc* of that portion of the Court's decision setting aside the requirement in the Board's order that respondent pay fringe benefits due under its contract with the Union. In support of its petition the Board shows as follows.

In this proceeding, the Court affirmed the Board's finding that respondent violated Section 8(a)(5) and (1) of the Act. That finding rested upon evidence that respondent had untimely sought to withdraw from a multiemployer Association, ceased paying contractual fringe benefits, obtained a refund of security deposited to assure such payments, and thrice refused to sign the agreement (Slip op. pp. 5-6). To remedy

the unfair labor practices found, the Board directed respondent, *inter alia*, to execute and honor the agreement and to "pay the appropriate source any fringe benefits provided for in the . . . contract" (R. 19). The panel enforced the first requirement of the Board's order but denied enforcement of the benefit payment provision on the ground that it constituted "an order to respondent to carry out provisions of the contract . . . beyond the power of the Board" (Slip. op. p. 7). We request that the Court grant rehearing *en banc* of the latter portion of the panel's decision. It conflicts with decisions of four other courts of appeals (the only relevant decisions),[1] casts doubt on

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[1] *N.L.R.B.* v. *George E. Light Boat Storage, Inc.*, 373 F. 2d 762, 768 (C.A. 5); *N.L.R.B.* v. *Huttig Sash and Door Co.*, 362 F. 2d 217 (C.A. 4); *N.L.R.B.* v. *Sheridan Creations, Inc.*, 357 F. 2d 245 (C.A. 2), cert. denied, 385 U.S. 1001; *N.L.R.B.* v. *M & M Oldsmobile, Inc.*, 377 F. 2d 712 (C.A. 2); *Ogle Protection Serv. Inc.*, 149 NLRB 545, 547, enforced in relevant part, 64 LRRM 2792 (C.A. 6). Cf. *N.L.R.B.* v. *United Nuclear Corp.*, Civ. No. 8887, decided August 23, 1967 (C.A. 10). The first cited case is on all fours with this one. In *Huttig, supra,* and in *M & M Oldsmobile, Inc., supra,* the courts enforced Board orders directing employers who refused to sign a contract in violation of the Act to make the employees whole by giving the negotiated contracts retroactive effect and by paying interest at 6% on such sums as the employees may have lost by reason of the company's unlawful refusal. In *Sheridan Creations, Inc., supra,* the court's enforcement decree directed the non-signing employer to pay its employees "any additional compensation . . . to which [they] would have been entitled under the agreement" and to "fulfill all other obligations . . . which respondent would have had" if it had signed. A copy of that decree has been lodged with the Court and served upon respondent. In *Ogle supra,* the Board, with court approval, directed the employer to give retroactive effect to an unsigned agreement.

the scope of the Board's remedial power, and, we respectfully submit, is in error for the reasons set forth below:

1. The function of a Board order, as the Supreme Court has repeatedly held, is to restore the situation, "as nearly as possible to that which would have obtained but for the illegal" conduct. *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 194.[2] Here, the record shows that, but for its refusal to treat the contract as binding, respondent would have made the required benefit payments on behalf of the employees. Thus, respondent's cessation of benefit payments and recovery of its security deposit were intertwined with its attempt to withdraw from the bargaining unit (R. 15). In ordering respondent to make those payments now, the Board is attempting to restore the *status quo* which would have obtained but for the unfair labor practices. The Board's broad statutory authority to order "such affirmative action . . . as will effectuate the purposes of the Act," Section 10(c), as authoritatively construed in *Phelps Dodge Corp.* v. *N.L.R.B.*, *supra*, thus authorizes the Board's order here.

We are aware of no authority prohibiting the Board from ascertaining the consequences of an unfair labor practice and fashioning its remedial order

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[2] Accord, *N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 344; *N.L.R.B.* v. *MacKay Radio Co.*, 304 U.S. 333; *Fibreboard Paper Prods. Co.* v. *N.L.R.B.*, 379 U.S. 203, 215-217. As those cases show, the Board has wide discretion in fashioning remedies, which is "subject to limited judicial review." *Phelps Dodge Corp.* v. *N.L.R.B.*, *supra*.

in light of the provisions of a collective bargaining agreement. Cf. *Corvallis Sand and Gravel Co.* v. *Hoisting Engineers, Local 701*, —— Or. ——, 419 P. 2d 38 (1966) (en banc), cert. denied, 387 U.S. 404.[3] On the contrary, in determining the back pay owed unlawfully discharged employees (*Chemrock Corp.*, 151 NLRB 1074, cf. *N.L.R.B.* v. *Central Ill. Pub. Serv. Co.*, 324 F. 2d 916, 918-919 (C.A. 7)), and to those deprived of benefits by a refusal to sign or honor an agreement (*M & M Oldsmobile, Inc.*, 156 NLRB 903, 917, *enforced*, 377 F. 2d 712, 715-716 (C.A. 2); *Huttig Sash and Door Co.*, 154 NLRB 811, 812, enforced, 377 F. 2d 964 (C.A. 8); *N.L.R.B.* v. *Huttig Sash and Door Co.*, 362 F. 2d 217 (C.A. 4); *K & H Specialities Co.*, 163 NLRB No. 79, 64 LRRM 1411; *New England Tank Industries*, 147 NLRB 598) the Board, with court approval, has customarily

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[3] Neither *N.L.R.B.* v. *Hyde*, 339 F. 2d 568, 572 (C.A. 9), nor *N.L.R.B.* v. *George E. Light Boat Storage, Inc.*, 373 F. 2d 762 (C.A. 5), relied upon by the panel, is *contra*. The latter case is precise authority for our position here (see n. 1, *supra*). In *Hyde, supra*, there was no finding that the employees were denied any benefits by their employer's refusal to sign the contract. Hence the Board's order, enforced by this Court, simply directed respondent to sign and honor the agreement. The statement in the Court's opinion here that "In general, the Board has no power to adjudicate contractual disputes" (slip. op. p. 7) is a dictum from *United Steelworkers* v. *American Int'l Aluminum Co.*, 334 F. 2d 147, 152 (C.A. 5), where the question decided was whether a District Court could order arbitration where some of the issues sought to be presented to the arbitrator paralleled those in a pending Board proceeding. The holding in that case that arbitration could proceed is consistent with our position here. See *Carey* v. *Westinghouse*, 375 U.S. 261, 268.

looked to the agreements that, but for the unfair labor practices, would have fixed the employees' compensation.

2. The panel's decision apparently rests upon an assumption that Section 301 of the Labor Management Relations Act, which confers jurisdiction upon federal courts to enforce collective bargaining agreements, deprives the Board of power to remedy the consequences of unfair labor practices flowing from a failure to honor or apply an agreement. The language of Section 301 does not suggest such a conclusion. And the National Labor Relations Act, far from stating that the Board must ignore the consequences flowing from an unlawful refusal to sign a contract because such consequences may conceivably be remedied in a contract action, expressly provides that the remedial power of the Board "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise." Section 10(a) of the Act. The legislative history of Section 10(a) makes plain that in re-enacting it in 1947, Congress intended that the remedial power of the Board and the courts should exist concurrently. "By retaining the language which provides the Board's power shall not be affected by other means of adjustment, the conference agreement makes clear that, when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in lieu of other remedies." H. Conf. Rep. No. 510, 80th Cong., 1st Sess. (1947), 1 Legislative His-

tory of the Labor Management Relations Act, 1947, 52 (1947). See *New Orleans Typographical Union* v. *N.L.R.B.*, 368 F. 2d 755, 766 (C.A. 5).

The Supreme Court and the courts of appeals have recognized Congress' intent and have repeatedly stated that the Board is not deprived of jurisdiction to adjudicate or remedy unfair labor practices merely because an alternative judicial or arbitral forum may exist for resolving the issue as a contract matter. See *Smith* v. *Evening News Ass'n*, 371 U.S. 195, 197 (dictum); *Carey* v. *Westinghouse*, 375 U.S. 261, 268 (dictum); *Local 174, Teamsters* v. *Lucas Flour*, 369 U.S. 95, 101 n. 9 (dictum); *N.L.R.B.* v. *C & C Plywood Corp.*, 385 U.S. 421; *N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. 432; *N.L.R.B.* v. *M & M Oldsmobile, Inc.*, 337 F. 2d 712 (C.A. 2); *New Orleans Typographical Union* v. *N.L.R.B.*, 368 F. 2d 755, 763 (C.A. 5). Nor, as those cases further show, does Congress' decision not to make a contract breach an unfair labor practice deprive the Board of jurisdiction to resolve contract issues which arise in the course of Board proceedings. *N.L.R.B.* v. *C & C Plywood Corp.*, 385 U.S. 421, 427.[4]

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[4] Indeed, prior to the recent Supreme Court decisions in *C & C Plywood* and *Acme Industrial Co.*, that Court never had occasion to pass upon a claim that the Board's jurisdiction was pre-empted by the asserted presence of a contract question or remedy. Rather, the question which had vexed that Court and commentators was whether, since issues presented in contract actions were also grist for the Board's mill, the courts had jurisdiction to proceed. *N.L.R.B.* v. *M & M Oldsmobile, Inc.*, 377 F. 2d 712, 715 (C.A. 2). See, *e.g.*, *Carey* v. *Westinghouse*, *supra*; *Smith* v. *Evening News Ass'n Co.*, *supra*; Dunau, *Contractual Prohibition of Unfair Labor Prac-*

3. In sum, the question of respondent's fringe benefit liability arises in the context of a breach of respondent's statutory obligation and the Board's duty in enforcing public, not private, rights (*Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 267-270), to determine what would have occurred but for respondent's violation of the Act. See *Phelps Dodge Corp.* v. *N.L.R.B.*, *supra*; *N.L.R.B.* v. *George E. Light Boat Storage, Inc.*, *supra*, 373 F. 2d 768, n. 9. Furthermore, there is no record evidence that, had respondent signed and honored the agreement, its employees would nevertheless not have received the fringe benefits provided in the contract. In these circumstances, Section 10(c) of the Act empowers the Board, to remedy respondent's unlawful refusal to bargain by ordering it to pay the fringe benefits which it would have paid under the contract had it not refused to bargain. Indeed, permitting the Board to proceed, rather than remitting the Union at the conclusion of the Board proceedings to its contract rights, if any, avoids multiple proceedings and inordinate delay in the implementation of the Act. Cf. *N.L.R.B.* v. *C & C Plywood Corp.*, *supra*, 385 U.S. at 429-430; *N.L.R.B.* v. *Huttig Sash & Door Co.*, 377 F. 2d 964, 970 (C.A. 8).

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tices; Jurisdictional Problems, 57 Colum L. Rev. 52 (1957); Sovern, *Section 301 and The Primary Jurisdiction of the National Labor Relations Board*, 76 Harv. L. Rev. 529 (1963), and cases cited therein. Cf. *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 245.

CONCLUSION

For the reasons stated, we respectfully request that the Court grant rehearing en banc limited to the substantial question presented above.

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CERTIFICATE OF COUNSEL

Marcel Mallet-Prevost, Assistant General Counsel of the National Labor Relations Board, certifies that he has read and knows the contents of the foregoing petition and that said petition is filed in good faith and not for the purposes of delay.

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National Labor Relations Board

Dated: September 1967.

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No. 20,771

United States Court of Appeals

For the Ninth Circuit

SAYRE & COMPANY, LTD.,
Appellant,

vs.

A. G. MADDOX, Commissioner of Revenue and Taxation,
Appellee.

Appellant's Opening Brief

On Appeal from the District Court of Guam

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

No. 20,771

United States Court of Appeals

For the Ninth Circuit

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Appellant,

vs.

A. G. MADDOX, Commissioner of Revenue and Taxation,
Appellee.

Appellant's Opening Brief

On Appeal from the District Court of Guam

JURISDICTIONAL STATEMENT

The jurisdiction of this action is vested in the District Court of Guam by Section 22(a), Organic Act of Guam, 72 Stat. 178 (1958), 48 U.S.C., Section 1424(a), and Guam Code of Civil Procedure, Section 82, in that the amount in controversy exceeds $2,000, exclusive of interest and costs. This Court has jurisdiction of this appeal: 28 U.S.C., Sections 41, 1291 and 1294(4).

STATEMENT OF FACTS

Appellant is a corporation organized in 1948 under the laws of the State of Hawaii with its principal office in Honolulu, Hawaii. Prior to 1955 appellant, a corporation,

actively engaged in selling household appliances in Hawaii under several exclusive franchise agreements. Appellant at no time operated as a business on Guam and has never conducted a retail sales program on Guam.

In 1954 John L. Sayre, president and controlling shareholder in Sayre and Company, Ltd., moved to Guam and opened a retail sales establishment as a sole proprietorship which did business as the Kirby Company. The appealing corporation made loans and advances to the Guam business to supplement Mr. Sayre's personal investments. The funds advanced to Mr. Sayre were carried on open account on the books of appellant bearing interest at 5% on the average, unpaid balances.

Appellant is the owner of several distributorship franchises for household appliances for the Pacific area which includes Hawaii and Guam. These franchises are exclusive and prohibit sales by other companies in the territory governed by appellant's agreement. Speed Queen washers and dryers, Kirby vacuum cleaners, and Amana freezers are among the named brand appliances covered by such agreements. These exclusive franchises are valuable property rights of the appellant.

Sayre & Company, Ltd. (hereinafter called Sayre) charged the Kirby Company (hereinafter called Kirby) the normal distributor commission on all products purchased under the exclusive franchise agreements. *R.T. 22. These commissions were not in excess of the amounts which would be obtained in a normal distributor-dealer relation. R.T. 22. At all times the separate entities of Sayre and Kirby were maintained.

The merchandise, upon which commissions were charged, was ordered directly by Kirby on Guam who took title to

*R.T. refers to Reporter's Transcript.

the merchandise and assumed risks of loss, F.O.B. factory, mainland United States. R.T. 23.

The amounts due to appellant from Kirby were used to defray the costs incurred in maintaining the Hawaiian corporation. The Hawaiian corporation continued to have costs in maintaining the various exclusive franchises. R.T. 24.

Sayre and Kirby maintained separate financial books and records during the entire period in question. Both companies used the accrual system of accounting; each reports income as the right to receipt occurs. During the tax years in question, 1955, 1956 and 1957, Sayre reported as income the amount of interest and commissions which had accrued to the United States Department of Internal Revenue and paid the applicable federal taxes. For each of these years, the federal government examined the returns and allowed certain business deductions claimed by appellant. R.T., Schedules 26, 27, 29 and 30.

On April 1, 1965, the appellee advised the appellant of deficiencies for tax years 1955, 1956, and 1957 in the total amount of $6,137.04 representing the tax calculated upon commissions and interest paid to the Hawaiian corporation. This action for redetermination of Guam territorial income tax was brought on August 30, 1965.

The government of Guam contended in the trial court that the amount received by the Hawaiian corporation was taxable under section 881 of the Internal Revenue Code, Title 26, made applicable to Guam by 48 U.S.C. § 1421. Section 881 of the Internal Revenue Code provides that a "foreign" corporation which is not engaged in trade or business within the United States (Guam) is taxed at the rate of 30% of the amounts received, from sources within the United States (Guam). At all times herein the government of Guam has contended that appellant is a foreign

corporation which is not engaged in business on Guam but receives income, interest and commissions from a Guam company and therefore taxable at the 30% gross income rate provided in § 881. Under § 881 no deduction for business expenses is allowed.

The trial court held that appellant was taxable under § 881 at the rate of 30% of gross income received from Guam and was not allowed any business deductions. Concluding that any person or corporation that received income from Guam must pay the Guam territorial income tax, the trial court upheld the assessment and gave judgment for the government in the amount of $6,137.

ISSUES PRESENTED

The issues presented by this appeal are as follows:

I. **Can Guam's Internal Revenue Code Be Given Extraterritorial Application to Tax the Intangibles of a Hawaiian Corporation?**

II. **May Guam Impose a Burden of Taxation More Onerous Than a State or the United States; Did the Trial Court Err in Characterizing Appellant as a Foreign Corporation?**

III. **Can the Internal Revenue Code, as Applied in Guam, Be Interpreted to Impose Taxes Which Discriminate Against Interstate Commerce and Deny Due Process of Law?**

SUMMARY OF ARGUMENT

Congress, in enacting the Organic Act of Guam, 48 U.S.C. § 1421 et seq., did not intend to allow Guam to give its tax laws extra-territorial application. In the instant case the government of Guam is attempting to tax a Hawaiian corporation which is not engaged in business on Guam. It is axiomatic that states do not possess such power; it is inconceivable that Congress intended Guam to have such authority.

The Organic Act expressly recognized that certain sections of the Internal Revenue Code could not be made

applicable to Guam. Consistent with this understanding § 1421i(d)(1) provides that the code was to apply except where "manifestly inapplicable or incompatible." Incontrovertibly the intent of Congress was to create a territorial income tax and the tax was so denominated. 48 U.S.C. § 1421i(b). This denomination recognizes the inherent territorial limitation of the tax to residents of Guam and those who do business within the territorial limits of Guam. Obviously the proper interpretation of the statute forecloses a tax upon foreign corporations who only receive income from Guam.

The revenue provision contested in the instant case is within "Subchapter N—TAX BASED ON INCOME FROM SOURCES WITHIN OR WITHOUT THE UNITED STATES, Part II. Nonresident aliens and foreign corporations." (§ 881. Tax on foreign corporations not engaged in business in United States.) The language of this section purports to tax *all* corporations whether within the territory or not. While such authority is within the powers of the federal government it cannot lightly be implied as given to Guam. Such a broad grant of power was not intended. Guam's territorial income tax is limited in application to objects of taxation within the jurisdiction of the Government of Guam.

Assuming *arguendo* that § 881 is not manifestly inapplicable, by definition, appellant cannot be considered within its terms. Internal Revenue Code § 7701, "Definitions", defines a domestic corporation to include a corporation which is organized under the laws of any State. Therefore, the proper construction of § 881 in Subchapter N precludes its application to a Hawaiian corporation, since by definition it is domestic.

Indisputably taxation of a Hawaiian corporation at a higher rate than a domestic corporation denies due process

of law guaranteed by the United States Constitution. A tax which penalizes a Hawaiian corporation by not allowing legitimate business deductions and imposes a flat 30% tax rate obviously unjustifiably discriminates against that corporation. No state has such power and a congressional intent to contravene the Constitution should never be implied.

Interest and commissions are presumptively taxable at the situs of the corporation and not elsewhere under the *mobilia sequunter personam* rule. Intangibles, debts and choses in action, have a taxable situs only at the owners domicile and only the domicilary state can tax the income from the intangibles. The government has clearly admitted that appellant does not do business on Guam. Therefore, the intangibles are only taxable by Hawaii since Guam does not provide any of the benefits of government, to this corporation, which is the basis for the imposition of taxes by all governments.

ARGUMENT

I. Can Guam's Internal Revenue Code Be Given Extraterritorial Application to Tax the Intangibles of a Hawaiian Corporation?

While state revenue laws may be applied to tax all property, persons and corporations within the state, the state cannot give those laws extraterritorial application. *Frick* v. *Pennsylvania*, 268 U.S. 473, 69 L.Ed. 1058(1925); *Union Refrigerator Transit Co.* v. *Kentucky*, 188 U.S. 385, 47 L.Ed. 513(1903); *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 82 L.Ed. 155(1937). The tax which the government of Guam attempted to impose herein is upon a corporation which is "not engaged in trade or business within Guam." 26 U.S.C. § 881—substituting "Guam" for "United States" as provided by 48 U.S.C. § 1421i(e). The government of Guam admits that it cannot tax the corporation under any other section of

the Internal Revenue Code, R.T. 14, as appellant does not engage in business within the territory.

This rule, precluding extraterritorial application of tax laws, is universally recognized. "As a general rule taxes may be imposed on, and only on a foreign corporation which is carrying on business within a state." 84 C.J.S., Taxation, § 188, 51 Am.Jur., Taxation, § 58. The legislative history of the Guam income tax law supports the conclusion that the intent of Congress was to allow a tax which was limited to residents and those doing business on Guam. The following testimony, during the debate, clearly indicates this limitation:

> Mr. PETERSON. Our colleague the gentleman from Nebraska [Mr. MILLER] has made a study of that. The amendment he offered and which we have adopted today will be very helpful in that respect.
>
> Mr. MILLER, of Nebraska. There will be no direct payment by the Treasury of this country. The amendment we just adopted in committee provides that the income tax laws in force in the United States of America and which may hereafter be in force will be the law over there. That will be of great help in plugging certain loopholes. The people of Guam and a large number of civilians and workers over there on construction work, as well as military personnel, pay no income tax or have no withholding tax. In fact, they are paid a bonus for working there. This will plug that loophole and bring in some money to the United States Treasury. As I understand it, the salaries of these people will be paid by the Guamanian Government and the average deposit in Guamanian banks of the people of Guam averages about $8,000.00.
>
> Mr. SCRIVNER. In other words, I am to understand that there is sufficient property, there are sufficient sources of revenue right there on the island of Guam so that they will be able to set up a tax structure suffi-

> cient to carry their own expenses of government without asking for any contribution from the United States to help carry their government cost?
>
> Mr. MILLER, of Nebraska. That is my understanding.
>
> Mr. PETERSON. That is my understanding also. 96 Cong. Rec. May 23, 1950, at page 7577.

Recognizing the territorial limits of the taxing authority conferred will give effect to the purpose of Congress which is the dominent factor in construing the statute. *U.S.* v. *C.I.O.,* 355 U.S. 106, 92 L.Ed. 1849(1948). Characterization of the tax as a Guam territorial income tax recognizes the limits expressly imposed upon the government of Guam. Residency limitations were recognized by the United States Revenue Service in Revenue Ruling 8, 1953-1 CB 300:

> A citizen of the United States *who is a resident of Guam* is liable to Guam for tax on his income from whatever source derived, . . . (emphasis added).

The Guam Internal Revenue Code was an adaptation from the Virgin Islands Law. *Holbrook* v. *Taitano,* 125 F.Supp. 14 (D.C. Guam 1954). Committee Report, U.S. Code Cong. and Ad. News, 1958, Vol. 2, page 3651. In I.T. 2946 XIV-Z CB 109, cited by the Congressional Committee with approval, the United States Commissioner interpreted the Virgin Islands Internal Revenue Act as applying to all citizens who have a *residence* there. The statute should be construed as a whole to give effect to the dominent purpose of Congress. *U.S.* v. *Alpers,* 338 U.S. 680, 94 L.Ed. 457(1950); *Worchester Felt Pad Corp.* v. *Tucson Airport Auth.,* 233 F.2d 44 (9th Cir. 1956). Congressional intention should be deduced from the statute as a whole. *Korte* v. *U.S.,* 260 F.2d

633 (9th Cir. 1959) cert. denied 358 U.S. 928, 3 L.Ed.2d 301 (1959).

Construed as a whole Subchapter N, Part II, of the Internal Revenue Code was meant to be applied by the United States but not by Guam. Protracted analysis is not required to see the inapplicability of the whole section. The title, "Nonresident Aliens and Foreign Corporations", alone indicates the inapplicability. Section 871—"Taxation of nonresident alien individuals, and section 891—Doubling of rates of tax on citizens and corporations of certain foreign countries", patently cannot be applied by Guam. Construction of this statute to prevent inconsistencies requires a determination that this Subchapter is manifestly inapplicable to Guam. This manifest inapplicability cannot be cured by a simple substitution of terms. An attempted extraterritorial application of the Guam territorial income tax law clearly contravenes the intent of Congress and the limitations inherent in the Territories' right to tax. Section 881 purports to tax all amounts received from sources within the United States for any reason. If applied as contended by appellee every company or individual who sold products to any one residing on Guam would be required to pay Guam income tax on such sales. Such a conclusion is unwarranted in the absence of specific Congressional authorization.

Constitutional principles arising from the due process clause of the 14th Amendment and the equal protection clause of the Constitution also dictate against the extraterritorial application of the Guam territorial tax. *McCulloch* v. *Maryland,* 4 Wheat 316, 4 L.Ed. 579 (1819) at 607. Unbroken precedent prescribes such construction. *Safe Deposit & T. Co.* v. *Maryland,* 280 U.S. 83, 74 L.Ed. 180(1929); *Frick* v. *Pennsylvania,* 268 U.S. 473, 69 L.Ed. 1058(1925). Absence

of benefits to the property prescribes taxation. *Wisconsin* v. *J.C. Penney Co.,* 311 U.S. 435, 85 L.Ed. 267(1941).

Factually it is undisputed that appellant did not engage in business on Guam. Appellant's right to the receipt of interest and commission income, from the loans and franchises, represents intangible personal property. The tax as assessed is upon this intangible personal property. Jurisdiction to tax intangibles can only occur in the corporation's domiciliary state. 84 C.J.S. Taxation, § 116; *Curry* v. *McCanless,* 307 U.S. 357, 83 L.Ed. 1339(1939) at 366; *First Bank Stock Corp.* v. *Minnesota,* 301 U.S. 234, 81 L.Ed. 1061 (1937) at 241; *Graves* v. *Schmidlapp,* 315 U.S. 657, 86 L.Ed. 1097(1941). This rule, *mobilia sequuntur personam,* exempts intangible property from taxes except at the domicile of the owner.

> In cases where the owner of intangibles confines his activity to the place of his domicile it has been found convenient to substitute a rule for a reason, cf. New York el rel. *Cohn* v. *Graves,* 300 U.S. 308, 313, 81 L.Ed. 666, 670, 57 S.Ct. 466, 108 A.L.R. 721; *First Bank Stock Corp.* v. *Minnesota,* 301 U.S. 234, 241, 81 L.Ed. 1061, 1065, 57 S.Ct. 677, 113 A.L.R. 228, by saying that his intangibles are taxed at their situs and not elsewhere, or perhaps less artificially, by invoking the maxim *mobilia sequuntur personam, Blodgett* v. *Silberman,* 277 U.S. 1, 72 L.Ed. 749, 48 S.Ct. 410, supra; *Baldwin* v. *Missouri,* 281 U.S. 586, 74 L.Ed. 1056, 50 S.Ct. 436, 72 A.L.R. 1303, supra, which means only that it is the identity or association of intangibles with the person of their owner at his domicile which gives jurisdiction to tax.

This rule has won unqualified acceptance. *First Bank Stock Corp.* v. *Minnesota,* 301 U.S. 234, 81 L.Ed. 1061(1937) at 241. The *mobilia sequuntur personam* rule therefore prohibits the application of a Guam tax upon the intangibles of a Hawaiian corporation.

II. May Guam Impose a Burden of Taxation More Onerous Than a State or the United States; Did the Trial Court Err in Characterizing Appellant as a Foreign Corporation?

Appellant reported the income in question to the United States in each of the years in question. In each year returns from the corporation were audited by the United States Internal Revenue Service. The United States made minor adjustments in the return but allowed the majority of the deductions claimed. The trial court did not allow any deductions for the years in question thus imposing a greater tax burden upon the appellant than that of the federal government.

The legitimacy of these deductions, as allowed by the federal government, is undisputed. An assessment by appellee which exceeds that which the federal government would make is doubtful. *Koster* v. *Government of Guam,* No. 20438, decided June 8, 1966 (9th Cir. 1966).

Since a corporation, incorporated under the laws of Hawaii, was denied any legitimate business deductions by the trial court, this ruling places a corporation organized under the laws of another state at a competitive disadvantage. This is not allowable under the prevailing and persuasive legal authority. *Wheeling Steel Corp.* v. *Glander,* 337 U.S. 562, 93 L.Ed. 1544(1949).

Assuming, *arguendo,* that the corporation was taxable it cannot be taxed as a "foreign" corporation under the internal revenue code. The code provides definitions in § 7701 applicable to § 881. R.T. 14. Domestic and foreign corporations are defined in § 7701 as follows:

> (4) The term "domestic" when applied to a corporation or partnership means created or organized in the United States or under the laws of the United States or of any State or Territory.

(5) Foreign.—The term "foreign" when applied to a corporation or partnership means a corporation or partnership which is not domestic.

Under these definitions the appellant, organized under the laws of the state of Hawaii, is a domestic corporation and by admittance of the defendant not taxable by the Government of Guam.

No doubt can exist that § 7701 applies to Guam under the relevant portion of Organic Act of Guam. 48 U.S.C. 1421 (d)(1). This provision of the code is applicable to Guam since it is not manifestly or otherwise inapplicable. *Koster* v. *Government of Guam,* No. 20438, decided June 8, 1966, (9th Cir. 1966).

III. Can the Internal Revenue Code, as Applied in Guam, Be Interpreted to Impose Taxes Which Discriminate Against Interstate Commerce and Deny Due Process of Law?

Under the due process clause of the Constitution, a state cannot impose a tax unless certain minimum contacts or a nexus with the taxing state is established. *International Shoe* v. *Washington,* 326 U.S. 310, 90 L.Ed. 95(1945). The contacts with the taxing state must be of such quality to make it reasonable, in the context of the federal system, to allow the jurisdiction to tax. Under this standard the tax as imposed by Guam denies due process of law since the tax is imposed upon a nonresident corporation which has no contacts with Guam other than the receipt of income. Secondly the tax imposed, 30% without legitimate business deductions, unduly burdens interstate commerce. Not a single direct impediment on interstate commerce is allowed to a state. *Gibbons* v. *Ogden,* 9 Wheat 1, 6 L.Ed. 23(1824); *Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, 3 L.Ed. 2d 421 (1959). A state cannot tax those who do not come

into the state or impose a tax on the privilege of engaging in interstate commerce. *Spector Motor Service, Inc.* v. *O'Connor,* 340 U.S. 602, 95 L.Ed. 573 (1951). Nor can a state impose a tax burden which prefers local business to interstate business. *Nippert* v. *Richmond,* 327 U.S. 416, 90 L.Ed. 760 (1946); *Freeman* v. *Hewitt,* 329 U.S. 249, 91 L.Ed. 265 (1946).

From the foregoing analysis it is obvious that section 881 was never intended to be applied by the government of Guam. Courts should never construe a statute to give it an unconstitutional application. *U.S.* v. *Witkovich,* 353 U.S. 194, 1 L.Ed.2d 765(1957); *Driscoll* v. *Edison Light and Power Co.,* 307 U.S. 104, 83 L.Ed. 1134(1957). The proper construction of the Internal Revenue Code, which should be construed as a whole, supra, is to limit its application to persons, objects and corporations within the jurisdiction. In construing this statute it must be presumed that Congress was aware of the established judicial decisions and limits imposed by the interstate commerce clause and the due process clause of the Constitution. In the absence of compelling evidence to the contrary the construction of the Organic Act should consider these decisions as limits which Congress considered unabrogated by the passage of that act.

CONCLUSION

Reversal of the decision of the District Court of Guam will affirm an unbroken line of judicial authority prohibiting extraterritorial application of state and territorial revenue laws. In the absence of express Congressional intention such a violent departure from established precedent should not be implied. Taxation of the intangible personal property of nonresidents in contravention of the commerce and due process clauses of the Constitution was never intended

by Congress. By definition appellant is not within the purview of the Internal Revenue section relied upon by appellee. Affirmation of the court's decision would give Guam the extraordinary power to tax any business which sold products to a resident of Guam. The decision of the District Court allows Guam to assess taxes which are arbitrary, discriminatory, and unreasonable since all legitimate business deductions are disallowed.

Therefore, appellant respectfully urge that the United States Court of Appeals for the Ninth Circuit reverse the decision of the District Court of Guam and remand this action to that court for further proceedings consistent therewith.

Dated at Agana, Guam 10 August 1966.

Respectfully submitted,

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DAVID S. MADIS
Attorneys for Appellant

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Attorney for Appellant

No. 20,771

IN THE

United States Court of Appeals

For the Ninth Circuit

SAYRE & CO., LTD.,
Appellant,

vs.

A. G. MADDOX,
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APPELLEE'S BRIEF

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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No. 20,771

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APPELLEE'S BRIEF

JURISDICTIONAL STATEMENT

Jurisdiction of this action is vested in the District Court of Guam by Section 31 of the Organic Act of Guam, as amended. 72 Stat. 681 (1958), 48 U.S.C.A. Section 1421i(h) (i). This Court has jurisdiction of this appeal. 28 U.S.C. Sections 41, 1291 and 1294(4).

STATEMENT OF FACTS

John L. Sayre in 1948 in Hawaii organized a corporation, all the stock of which, except for qualifying shares, was owned by him (R. 2). The corporation was primarily organized to sell vacuum cleaners on a door-

to-door basis. As the Hawaiian market became saturated, Sayre determined to open a business in Guam. The principal item at that time was the Kirby Vacuum Cleaner. In order to undertake the business in Guam, Mr. Sayre did the following:

As Sayre and Company, Ltd., he loaned to himself in Guam a sufficient amount of money, supplies, materials, furniture and other items to begin the operation of the business in Guam, the Guam business being operated under the name of The Kirby Company of Guam (R 20). Further, he contacted a number of leading manufacturers in the United States and obtained the exclusive franchise for the sale of refrigerators, stoves and other items, as he already had the exclusive franchise for the sale of Kirby Vacuum Cleaners (R 21).

As the Kirby Company of Guam, he then agreed to pay Sayre & Company, Ltd., Hawaii, a commission, based on the fact that he had exclusive franchises to sell the various items (R 22). These commissions were set up on the Kirby books as owing to Sayre & Company, Ltd., as follows: 1955: $4,560; 1956: $4,450.94; 1957: $4,687.28 (R 23). The Kirby Company of Guam also set up on its books the loan obligation to Sayre & Company, Ltd. During the year 1955, Kirby showed a payment of $2,000.13 interest to Sayre & Company, Ltd., and its books showed interest accrued in the amount of $2,321.19 for 1956 and $2,437.25 for 1957 (R 47, 22).

The local Commissioner of Revenue and Taxation determined that these commissions and interest were

taxable to Sayre & Company, Ltd., and on April 1, 1965, advised Sayre of a deficiency for the tax years ended November 30, 1955, November 30, 1956, and November 30, 1957, in the aggregate amount of $6,137.04 (Petition, pars. II and III; Answer, pars. 2 and 3). Sayre & Company, Ltd., filed a petition for redetermination on August 30, 1965. The District Court of Guam held that appellant was taxable under Section 881 of the Internal Revenue Code and gave judgment for the government in the amount of $6,137 (R 52).

ISSUES PRESENTED

1. Can the Government of Guam tax the intangibles of a Hawaiian corporation?

2. In interpreting the provisions of the Internal Revenue Code does Guam stand in the position of one of the United States? Could appellant be considered a foreign corporation under the provisions of Section 881(a) of the Internal Revenue Code?

3. Does the taxation of appellant under Section 881(a) of the Internal Revenue Code discriminate against interstate commerce and deny due process of law?

SUMMARY OF ARGUMENT

Guam could tax appellant as a non-resident, foreign corporation under the provisions of Section 881(a) of the Internal Revenue Code. The provisions of the

Internal Revenue Code are in force in Guam. In applying the Guam territorial income tax "Guam" may be substituted for "United States" in the applicable provisions. Such tax is justified in view of the special status of Guam. No deductions are allowed. The tax imposed does not constitute a burden on interstate commerce nor deny due process of law.

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1. CAN THE GOVERNMENT OF GUAM TAX THE INTANGIBLES OF A HAWAIIAN CORPORATION?

Under 48 U.S.C.A. Section 1421i(a) the income tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam. Under Section 1421i(e) in applying as the Guam territorial income tax the income tax laws in force in Guam, except where it is manifestly otherwise required, the applicable provisions of the Internal Revenue Codes of 1954 and 1939 shall be read so as to substitute "Guam" for "United States." "* * * and with other changes in nomenclature and other language, including the omission of inapplicable language, where necessary to effect the intent of this section."

Section 881(a) of the Internal Revenue Code imposes a tax on every foreign corporation not engaged in trade or business within Guam (substituting "Guam" for "United States") of 30% of the amount received from sources within Guam (same substitution) as interest, etc. The enumerated items of income may all be said to be intangibles. Counsel for appel-

lant contends that jurisdiction to tax intangibles can only occur in the corporation's domiciliary state. The residence of the obligor who pays the interest, rather than the physical location of the securities or the place of payments, is the determining factor of the source of interest income. 8 Mertens, Federal Income Taxation, Section 45.29 (1964). If counsel's contention be correct, then by the same reasoning, neither could Congress impose such a tax.

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2. IN INTERPRETING THE PROVISIONS OF THE INTERNAL REVENUE CODE DOES GUAM STAND IN THE POSITION OF ONE OF THE UNITED STATES? COULD APPELLANT BE CONSIDERED A FOREIGN CORPORATION UNDER THE PROVISIONS OF SECTION 881(a) OF THE INTERNAL REVENUE CODE?

The trial Court correctly held that the appellant was a foreign corporation and subject to tax under Section 881(a) of the Internal Revenue Code. (R 52, 53). The Court did not err in refusing to allow deductions.

Under Section 1421i(e) of the Organic Act of Guam (48 U.S.C.A.) above quoted, the applicable provisions of the Internal Revenue Codes of 1954 and 1939 shall be read so as to substitute "Guam" for "United States." If we are to adhere to the scheme of taxation as laid down by Congress in the Revenue Laws, it seems that like considerations must be entertained in drawing the distinction between a domestic and a foreign corporation for Guam tax purposes. Thus, since the Government of Guam has personal jurisdiction over all corporations organized in the territory of

Guam, it should tax these corporations on income from whatever source and thus treat them as domestic corporations. On the other hand, since it does not have personal jurisdiction over all corporations not organized in its territory, it should tax these corporations only on income over which it has jurisdiction and control, and treat them as foreign corporations. A further argument is found in the parallel problems besetting the Federal Government and the Government of Guam in effecting the enforcement of tax laws against corporations not within their jurisdiction. The problem the Federal Government faces in effecting collection of tax from a British corporation not doing business in the United States is similar to the problem faced by the Government of Guam in effecting collection of tax from a California or New York corporation not doing business in Guam.

The interpretation of Section 881 of the Internal Revenue Code so as to apply to appellant is also justified considering the special status of the territories vis-a-vis the United States. United States citizens who are legal residents of the territory cannot participate fully in the affairs of the Federal Government, nor do all grants of power and limitations of the United States Constitution apply in the unincorporated territories.

As to deductions, U. S. Treasury Regulation 1.882-3 provides that:

> "For purposes of computing the tax imposed by Section 881(a) and described in Section 1.881-2, a non-resident foreign corporation shall not be

> allowed any deductions, since the tax is imposed upon the gross amount received from sources within the United States."

The lower Court therefore did not err in refusing to allow deductions.

As to the decision regarding appellant's corporate status, no objection was made by counsel to the holding of the Court that the appellant was a foreign corporation, nor in fact was any argument made on the point. It is well settled that where no objection is made to a ruling of the lower Court, the question will not be considered on appeal.

A party litigant may not sit quiet at the time action is taken in the trial Court and then complain on appeal, but he is required to indicate in some appropriate manner his objection or dissent. *Occidental Petroleum Corp. v. Walker* (C.A. Okla. 1961, 289 F.2d 1).

Objections not made in trial Court cannot be raised on appeal to Court of Appeals. *Pacific Contact Laboratories, Inc. v. Solex Laboratories, Inc.* (C.A. Cal. 1954, 209 F.2d 529, certiorari denied 75 S.Ct. 26, 348 U.S. 816, 99 L.Ed. 643).

3. **DOES THE TAXATION OF APPELLANT UNDER SECTION 881(a) OF THE INTERNAL REVENUE CODE DISCRIMINATE AGAINST INTERSTATE COMMERCE AND DENY DUE PROCESS OF LAW?**

Counsel for appellant argues that under the due process clause of the Constitution, a state cannot impose a tax unless certain minimum contacts or a nexus with the taxing state is established. As cited above under the first argument, the residence of the obligor who pays the interest, rather than the physical location of the securities or the place of payment, is the determining factor of the source of interest income. 8 Mertens, Federal Income Taxation, Section 45.29 (1964).

It has been held that generally the due process clause of the 5th Amendment is not a limitation on Congress' taxing power, and applies to a taxing statute only if so arbitrary as to constitute confiscation. *Kingman & Co. v. Smith,* 17 F.Supp. 217 (D.C. 1936).

Counsel also contends that the tax imposed, 30% without legitimate business deductions, unduly burdens interstate commerce. However, the rate of tax is not for the Courts to decide. It has been held that the fact that the rate of taxation is high does not make the tax a penalty or render it invalid, for where the power to tax exists the extent of the burden is a matter for the discretion of the legislative body. *White Packing Co. v. Robertson,* 4th Cir. 1937, 89 F.2d 779.

Furthermore, the tax is imposed on amounts received from sources within Guam (substituting "Guam" for the "United States"). It would therefore seem that interstate commerce is not involved.

CONCLUSION

The tax imposed on the appellant is legal. In construing the provisions of the Internal Revenue Code an analogy cannot be drawn between Guam and one of the United States, since Guam is an unincorporated territory and has a status unlike that of a state.

It is therefore respectfully submitted that the decision of the District Court of Guam should be affirmed.

Dated, Agana, Guam,
January 12, 1967.

Respectfully submitted,

HAROLD W. BURNETT,
Attorney General,

C. E. MORRISON,
Assistant Attorney General,

Attorneys for Appellee.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

C. E. MORRISON,
Assistant Attorney General,

Attorney for Appellee.

No. 20,771

In the

United States Court of Appeals

for the Ninth Circuit

SAYRE & COMPANY, LTD.,
Appellant,

vs.

A. G. MADDOX,
Appellee.

Appellant's Reply Brief

On Appeal from the District Court of Guam

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No. 20,771

In the

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vs.	
A. G. MADDOX,	*Appellee.*

Appellant's Reply Brief

On Appeal from the District Court of Guam

ARGUMENT

I. A Corporation Organized Under the Laws of Any State or Territory Is a "Domestic" Corporation.

Appellee contends that § 881(a) of the Internal Revenue Code authorizes Guam to tax appellant as a nonresident foreign corporation. This contention is seriously made even though appellee had unsuccessfully made the same contention previously in a similar case. In *Atkins, Kroll (Guam) Ltd., v. Government of Guam,* 367 F.2d 127 (9th Cir. 1966), the court held that the District Court of Guam erred in concluding that Atkins, Kroll, a California corporation, was a foreign corporation under Guam tax law. In reaching that

conclusion, the court reasoned that § 881(a) does not make a corporation defined as domestic under § 7701 of the Internal Revenue Code a foreign corporation as to Guam because a manifest and substantial inequity would result from such a conclusion.

II. Guam Has No Special Tax Privileges Not Available to States.

The Government of Guam argues that failing to allow deductions and imposing the straight 30% tax on income derived from Guam does not constitute a burden on interstate commerce. No authority is cited for that statement, nor is there any. The United States may impose a 30% tax on a foreign corporation as the commerce clause of the Constitution is inapplicable to the federal government. However, Guam, nor any state or possession, may not impose a discriminatory tax on a non-local domestic corporation. The logical conclusion of such a contention would be that any state or territory in the union could impose a flat 30% income tax on all corporations, not organized in or doing business in that state, against all income derived from the state. Such a conclusion has never been reached even by the courts. In fact, Congress has, by virtue of § 381, Title 15, United States Code, very severely restricted the rights of the states to tax income from interstate commerce. § 381 shows a clear Congressional intent to permit state taxation only when the corporation or person taxed has specified business activities within the taxing state. Although § 381 did not become law until 1959, it is a stipulated fact in the instant case that appellant had no contact whatsoever with Guam during the years in question and certainly was not doing business there in any way. Therefore, if it is a domestic, though non-Guam corporation, it is not subject to the provisions of § 881(a) of the Internal Revenue Code.

III. Appellant Cannot Be Taxed at All by Guam Since There Is No Business Activity or Domicile of Appellant in Guam.

Guam has no special privilege to tax as contended by appellee. Guam has no "special status" and no authority is cited by appellee to support that contention. To hold otherwise would be to give Guam the unlimited power to require income tax on all income derived from Guam by any person or corporation, whether domestic in the United States or foreign. This would mean that a company such as Montgomery Wards would have to pay income tax on income derived from sales in Guam transacted entirely by mail. This is carrying the power of a state or territory to tax to the point of the ridiculous.

It is well settled that the power to levy an income tax against a foreign corporation by a state is contingent on the foreign corporation engaging in some business activity in the taxing state. *Spector Motor Service Inc. v. O'Conner,* 340 U.S. 602, 95 L.Ed. 573 (1951).

IV. The Status of Appellant Corporation Is a Question of Law.

Appellee argues that no express objection was made by counsel to the holding by the court that the appellant was a foreign corporation. Since it was admitted and not contested that appellant was a corporation incorporated in the State of Hawaii, its status under the Internal Revenue Code as applied to Guam is a question of law. Also, it appears from the record (R.T. 51) that the court apparently thought it was applying the tax against Kirby Company in Guam on profits made by the Kirby Company. The Court said:

> "But the fact remains that Kirby and Company did make profits in Guam; that money was received over and above expenses in adequate amounts to pay Sayre, Honolulu; that Sayre said it had been paid, either in money or in kind, to the Federal Government, and that

> under the local law, this being a separate territorial tax set up by the United States Congress, the local government is entitled to collect an income tax on non-exempt funds received by a corporation in Guam. Therefore, the court finds in favor of the defendant and against the plaintiff."

From the foregoing, it would appear that the court was making a finding that Kirby and Company of Guam should never have made the payments to Sayre as deductible business expenses. The record does not justify such an assumption.

Dated at Oakland, California, February 21, 1967.

BARRETT, FERENZ & TRAPP
W. SCOTT BARRETT
Attorneys for Appellant

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

W. SCOTT BARRETT
Attorney for Appellant

No. 20,771

IN THE

United States Court of Appeals

For the Ninth Circuit

SAYRE & COMPANY, LTD.,
Appellant,

vs.

R. A. RIDDELL, Commissioner of Revenue and Taxation,
Appellee.

On Appeal from the Judgment of the District Court of Guam

PETITION OF THE APPELLEE FOR REHEARING EN BANC

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IN THE

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Appellee.

On Appeal from the Judgment of the District Court of Guam

PETITION OF THE APPELLEE FOR REHEARING EN BANC

R. A. Riddell, successor in office to A. G. Maddox, Commissioner of Revenue and Taxation of Guam, the appellee herein, respectfully petitions this Court pursuant to Rule 23(5) for a rehearing en banc. The Court's opinion was filed on May 5, 1967. The time within which to file a petition has been extended by the Court to July 5, 1967.

The question is whether taxpayer, a Hawaiian corporation, is a "foreign corporation" subject to the 30 percent Guam Territorial income tax on amounts received from sources within Guam by foreign corporations.[1]

The Court held that taxpayer was not required to pay tax to Guam on amounts received as interest and compensation (commissions), reversing the District Court in a *per curiam* opinion "on the authority of *Atkins-Kroll (Guam) Ltd. v. Government of Guam,* 367 F.2d 127 (9th Cir. 1966), certiorari denied, [386] U.S. [993] (1967)." This conclusion, we submit, is erroneous because:

(1) Assuming the correctness of the decision in *Atkins-Kroll* as to dividend income, that case is no authority for holding that the present taxpayer is not subject to Section 881 tax on its interest and commission income; there is here no instance of double taxation by Guam, the prevention of which was the stated basis of that decision, and the effect of the Court's decision herein is to exempt taxpayer from any Guam tax.

(2)(a) *Atkins-Kroll* incorrectly held that a California corporation was a "domestic" corpora-

[1]Section 881, Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Sec. 881), as made applicable to Guam by Section 31 of the Organic Act of Guam (48 U.S.C. 1964 ed., Sec. 1421i).

tion and thus not subject to Guam's 30 percent income tax on amounts received as dividends from sources in Guam by "foreign" corporations; and

(b) it failed to consider that the logical consequence of its holding would be to subject the California parent corporation to the corporate income tax under Section 11—not to exempt the parent corporation from all Guam income taxes.

1. Even if *Atkins-Kroll* was correctly decided as to dividend income, its rationale does not support the action taken by the Court in this case. In *Atkins-Kroll,* the Court first decided that, for Guam tax purposes, the definition of "domestic" corporation should be one "created or organized in GUAM or under the law of GUAM *or of any State or Territory.*"[2] It then moved to the crux of the problem, i.e., whether the italicized phrase should be omitted as "inapplicable language" (Section 31(e), Organic Act of Guam). Concluding that the phrase must be retained, the Court held that Atkins-Kroll's parent corporation was a "domestic" corporation of Guam and thus not subject to the Section 881 tax on the dividend. The Court reasoned that (367 F.2d, p. 129)—

> with respect to [Section 881], unless the words "or of any State or Territory" are given full application, a manifest and substantial inequity results, for otherwise the combined Guam and Federal tax burden on the income which a California corporation ultimately receives from the business of its Guam subsidiary substantially exceeds the applicable corporate income tax rate under either the laws of Guam or the United States. We find nothing to indicate that Congress

[2]The word "GUAM" indicates a substitution in Section 7701(a)(4), 1954 Code, for the words "United States."

> intended the Guam tax laws to be interpreted so as to reach such a result.[3]

Thus the basis for the decision was the Court's judgment that Congress could not have intended that Guam tax corporate earnings twice—once when earned by the corporation and once when paid to its shareholders as a dividend.

However, in the instant case, we are concerned with interest and compensation, not dividends. Such items were not subject to Guam taxes in the hands of Kirby and Company; they were deductions from gross income. 1954 Code, Sections 162, 163. Thus, the Section 881 tax is the first—and only—Guam tax to which they can be subject. Consequently, taxpayer should be taxed by Guam at least on these items even under the rationale of *Atkins-Kroll,* for there is here no double taxation.

Under the Court's opinion (disregarding for the moment Section 11), taxpayer would pay no tax to Guam notwithstanding the fact that these items were derived from activities in Guam. This result is plainly inconsistent with the Congressional motive for creating a separate Guam income tax, i.e., the independence which follows from its being able to raise revenue from its own sources for its domestic purposes and to eliminate the need for direct appropriations from the federal treasury. *Laguana v. Ansell,* 102 F.Supp.

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[3]The Court's reference to "Federal" taxes here is unclear. Atkins-Kroll paid no tax on its earnings to the United States since it was a foreign corporation neither doing business in the United States nor earning income from sources in the United States. 1954 Code, Sections 881, 882. Its California parent owed no federal tax on the dividends; it was required to include the dividends derived from Guam in its gross income for federal income tax purposes, but would have been entitled to a foreign tax credit (Sections 901-904, 1954 Code) equal to the federal tax liability incurred with respect to such dividends. See Brief for Appellant, pp. 9-11, *Atkins-Kroll (Guam), Ltd. v. Government of Guam,* 367 F.2d 127 (C.A. 9th, 1966).

919, 920-921 (Guam, 1952), affirmed *per curiam,* 212 F.2d 207 (C.A. 9th, 1954), certiorari denied, 348 U.S. 830 (1954).

Thus, further review of this case is required.

2a. As the Court noted in its *per curiam* opinion, the Government of Guam sought review by the Supreme Court of the *Atkins-Kroll* decision; we sincerely believed the decision to be erroneous and of sufficient importance to merit review.[4] Since we continue to hold that belief and since the Court's decision in this case rests entirely on the authority of *Atkins-Kroll,* we here urge its reexamination and reversal.

The decision contains two fundamental defects: (1) it violates the basic premise on which Guam's corporate tax law is based, i.e., that Guam and the United States are separate and distinct taxing jurisdictions,[5] so that Guam corporations are "foreign" for purposes of the United States income tax and United States corporations are "foreign" for purposes of the Guam tax.[6] (2) The Court's reasoning ignores the equally fundamental concept that a corporation and its shareholders are separate taxable entities, so that income may be taxed once when earned by the corporation and again when received by the shareholders as dividends.

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[4]For the information of the Court, three copies of the petition for certiorari, brief in opposition, and reply memorandum are being lodged with the Clerk.

[5]Organic Act of Guam, Sec. 31(b); *Laguana v. Ansell,* 102 F. Supp. 919 (Guam 1952), affirmed *per curiam,* 212 F.2d 207 (C.A. 9th, 1954), certiorari denied, 348 U.S. 830 (1954); *Jennings v. United States,* 168 F.Supp. 781 (Ct. Cl., 1958), vacating opinion, 155 F.Supp. 571 (1957); I.T. 4046, 1951-1 Cum. Bull. 57.

[6]Rev. Rul. 56-616, 1956-2 Cum. Bull. 589. Presumably a United States citizen resident in the United States would be a nonresident alien so far as Guam is concerned. A citizen of Guam resident in Guam is considered a nonresident alien so far as the United States is concerned. 1954 Code, Section 932; Rev. Rul. 56, 1953-1 Cum. Bull. 303.

b. The stated basis for the Court's holding in *Atkins-Kroll* was the elimination of double taxation and apparently the Court considered that its conclusion regarding Section 881 would free the corporate earnings from a second tax. The statute plainly denies this. The tax imposed by Section 881 is, by its terms "in lieu of the taxes imposed by section 11." Thus, under the scheme of the Code, the fact that shareholders are *foreign* corporations or citizens affects only the rate of the tax imposed at the shareholder level and the method of collection, but not whether they are taxed.

The logical consequence of the decision in *Atkins-Kroll* would appear to exempt from the Section 881 tax, and its implementing administrative measures, those United States corporations receiving income from Guam, but at the same time subject them to the Section 11 tax as domestic corporations of Guam. Guam taxes domestic corporations on income derived from all sources. See *Government of Guam v. Koster,* 362 F.2d 248, 249 (C.A. 9th, 1966). Thus, if a United States corporation receives *any* dividend, interest or other "fixed or determinable annual or periodical income" (Section 881) from Guam, it becomes a domestic corporation of Guam subject to Guam corporate tax on its *world-wide income.*

There are grave defects in the Court's reversal of the judgment of the District Court in this case. For the reasons stated, this petition for a rehearing en banc should be granted.

Dated: June 30, 1967.

Respectfully submitted,
HAROLD W. BURNETT,
Attorney General,
Attorney for Appellee.

CERTIFICATE OF COUNSEL

The undersigned counsel for the appellee hereby certifies that the foregoing petition for rehearing en banc is presented in good faith and not for the purpose of delay.

HAROLD W. BURNETT,
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Attorney for Appellee.

20776

MISC. NO. ~~2670~~

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES AND THE NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,

Appellants,

vs.

PHYSICS TECHNOLOGY LABORATORIES, INC., et al.,

Appellees.

BRIEF FOR APPELLANTS

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

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MISC. NO. 2670

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES AND THE NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,

Appellants,

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PHYSICS TECHNOLOGY LABORATORIES, INC., et al.,

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BRIEF FOR APPELLANTS

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
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MISC. NO. 2670

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FOR THE NINTH CIRCUIT

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vs.

PHYSICS TECHNOLOGY LABORATORIES, INC., et al.,

Appellees.

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an interlocutory appeal from an order filed November 2, 1965 [R. 15-17] 1/ by the United States District Court for the Southern District of California, Southern Division, denying the Government's Motion to Dismiss filed August 20, 1965 [R. 11-14]. This Motion to Dismiss was made pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure and was based upon the lack of jurisdiction of the District Court over the subject matter of this action. Appellees had filed the Complaint and invoked the

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1/ "R" as used herein, refers to Clerk's Transcript of Record.

jurisdiction of the District Court under the Federal Tort Claims Act, 28 U. S. C. 1346(b), 1402, and 2671-2678 and the criminal provisions of 18 U. S. C. 1905. By an order entered January 28, 1966, the District Court amended its order denying the Government's Motion to Dismiss to certify that "this order involves controlling questions of law as to which there are substantial grounds for difference of opinion and an immediate appeal from this order may materially advance the ultimate termination of this litigation" [R. 44]. The Government, on February 2, 1966, filed in this Court a timely Application for Leave to Take Interlocutory Appeal under 28 U. S. C. 1292(b), which Application was granted February 17, 1966. The Government's Notice of Appeal was filed February 25, 1966 [R. 48]. This Court's jurisdiction accordingly rests upon 28 U. S. C. 1292(b).

STATEMENT OF THE CASE

By this action appellees seek a judgment in the amount of $5,000,000 for damages allegedly sustained as a result of an alleged disclosure by officers and employees of the National Aeronautics and Space Administration (NASA) to persons outside the Government of a so-called "Space Propulsion Concept", which concept plaintiffs claim was their "trade secret and proprietary right". Appellees allege in paragraph 6 of the Complaint that they submitted this concept to NASA on or about October 25, 1961 and that the officers and employees of NASA "received and accepted

said concept on a secret and confidential basis and agreed to retain the same on a secret and confidential basis" [R. 6]. Appellees contend that on or about June 27, 1963 or within a short time thereafter, notwithstanding this alleged agreement, NASA's officers and employees, while acting within the scope of their employment, "negligently and/or wrongfully" disclosed appellees' trade secret and proprietary right to persons outside the Government [R. 7].

The jurisdiction of the District Court is invoked by appellees under the provisions of the Federal Tort Claims Act, 28 U. S. C. 1346(b), 1402 and 2671-2678, and under the criminal provisions of 18 U. S. C. 1905 [R. 2].

The Government moved to dismiss the Complaint on the ground that if the allegations set forth in plaintiffs' Complaint give rise to a cause of action against the United States, this action may be maintained only under the Tucker Act, 28 U. S. C. 1491, since the Complaint, in essence, alleges the breach by NASA of an express or implied-in-fact agreement or contract between plaintiffs and NASA that the latter would not disclose plaintiffs' "trade secret" to persons outside the Government. Because the amount demanded exceeds $10,000, an action under the Tucker Act may only be maintained in the Court of Claims. The same is true to the extent the action is founded on Federal statute or regulation.

The District Court denied the Government's Motion to Dismiss by an order filed November 2, 1965 [R. 15-17] and held that "if the facts alleged in plaintiffs' [Appellees'] complaint and memorandum are such that Ohio law -- where the transaction

occurred -- would allow recovery in tort, this court does have jurisdiction" [R. 17].

On November 12, 1965 the Government filed a Motion to Amend the order denying the motion to dismiss to permit an interlocutory appeal under the provisions of 28 U. S. C. 1292(b). This motion to amend was granted by an order entered January 28, 1966 [R. 44], permitting this appeal.

While the Motion to Amend was pending, appellees filed an Amended Complaint on November 30, 1965 joining as defendants General Mills, Inc., Litton Industries, Inc. and Litton Systems, Inc. [R. 25-38].

The allegations in the Amended Complaint with respect to the Government are identical to those set forth in the original Complaint, with one exception. In the original Complaint, appellees allege that the officers and employees of NASA "received and accepted said concept on a secret and confidential basis and agreed to retain the same on a secret and confidential basis" [R. 6]. In the Amended Complaint it is contended instead that the officers and employees of NASA "received and accepted said concept to consider, study, keep, hold and retain on a secret and confidential basis" [R. 29]. It is the Government's position that this change in language in no way alters the substance of appellees' cause of action, since in cases where a party claims that a trade secret disclosed "in confidence" was later disclosed to others in breach of the confidence, "the basis of relief is actual or threatened breach of the obligation of an implied contract . . .". Annot.,

170 A. L. R. 449, 476 (1947).

On January 12, 1966, appellees filed a Notice of Dismissal of Count II of the Amended Complaint [R. 42, 43], and on March 4, 1966 appellees filed a Notice of Dismissal of the cause of action as to General Mills, Litton Industries and Litton Systems [R. 46, 47]. This left the Government as the only defendant under the Amended Complaint.

STATUTORY PROVISIONS

1. The Tucker Act, as it appears at 28 U. S. C. 1491, provides in pertinent part:

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

2. 28 U. S. C. 1346(a)(2) provides:

> "The district courts shall have original jurisdiction, concurrent with the Court of Claims, of: . . .
>
> (2) Any other civil action or claim against the United States, not exceeding $10, 000 in amount, founded either upon the Constitution, or any act

of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in Tort."

3. The Federal Tort Claims Act, as it appears at 28 U.S.C. 1346(b), provides in pertinent part:

"Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

4. 18 U.S.C. 1905 provides in pertinent part: "Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any

information coming to him in the course of his employment or official duties . . ., which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus . . . shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment."

SPECIFICATION OF ERRORS RELIED ON

1. The District Court erred in holding that it had jurisdiction over the subject matter of this action under the Federal Tort Claims Act.

2. The District Court erred in looking to the law of the State of Ohio and in holding that if the facts alleged are such that Ohio law would allow recovery in tort, the District Court has jurisdiction under the Federal Tort Claims Act.

3. The District Court erred in refusing to dismiss appellees' Complaint, or alternatively, to transfer the cause to the United States Court of Claims under 28 U.S.C. 1406(c).

QUESTIONS PRESENTED

1. In an action to recover damages in excess of $10,000 resulting from a disclosure by Government employees to persons outside the Government of privately owned "trade secrets"

in violation of an asserted confidential relationship or agreement not to do so, or of a Federal statute or regulation, may jurisdiction be based upon the Federal Tort Claims Act, or must jurisdiction be based upon the Tucker Act for breach of an implied contract or agreement or violation of Federal law or regulation in an action which cannot be maintained in the district court?

2. Implicit in the first question is whether state law or federal common law is to be applied in determining (i) whether there was an implied agreement or promise by a Government agency, its officers or employees not to disclose the "trade secret", (ii) whether there was a breach of such an agreement or promise, and (iii) what would be an appropriate remedy.

SUMMARY OF ARGUMENT

It is the Government's position that if an action may be maintained against it arising out of the facts alleged in appellees' Amended Complaint [R. 25-38], such action may not be based upon the Federal Tort Claims Act, but may be maintained only under the Tucker Act for the breach of an implied contract or agreement between appellees and NASA that NASA would not disclose appellees' alleged "trade secret" to persons outside the Government.

Under the common law, the breach of a confidential relationship apparently would give rise to a cause of action either for a

breach of contract or in tort. 2/ The District Court in its Memorandum of Opinion on Defendants' Motion to Dismiss notes, for example, that:

> Absent the issue of jurisdiction which here exists, there has been little reason to debate the issue as to whether an action for the revelation of a trade secret by a prospective purchaser sounds in contract or tort. However, the trend seems to be that relief can be obtained through either avenue [R. 16].

2/ Section 757 of the Restatement of Torts (1939 edition) provides in relevant portions that:

> "One who discloses or uses another's trade secret, without privilege to do so, is liable to the other if (a) he discovered the secret by improper means, or (b) his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him. . . ."

In commenting on clause (b), the Restatement notes that:

> "A breach of confidence under the rule stated in this clause may also be a breach of contract which subjects the actor to liability under the rules stated in the Restatement of Contracts. But whether or not there is a breach of contract, the rule stated in this Section subjects the actor to liability if his disclosure or use of another's trade secret is a breach of the confidence reposed in him by the other in disclosing the secret to him. The chief example of a confidential relationship under this rule is the relationship of principal and agent. . . . But this confidence may exist also in other situations. For example, A has a trade secret which he wishes to sell with or without his business. B is a prospective purchaser. In the course of negotiations, A discloses the secret to B solely for the purpose of enabling him to appraise its value. . . . [In such a case] B is under a duty not to disclose the secret or use it adversely to A.

It is the Government's contention, however, that where the suit is against the United States, relief cannot be obtained through either avenue; to permit such a choice would destroy the distinction between contract actions and tort actions, which distinction is carefully preserved in the federal statues. And this distinction is not an academic one, since under the Federal Tort Claims Act, state law governs in determining and measuring liability, whereas under the Tucker Act uniform federal common law is controlling. Woodbury v. United States, 313 F. 2d 291 (9th Cir. 1963); Padbloc Co. v. United States, 161 Ct. Cl. 369, 137 U. S. P. Q. 224 (Ct. Cl. 1963). Moreover, the district Courts have exclusive jurisdiction in actions under the Federal Tort Claims Act, whereas the Court of Claims has exclusive jurisdiction in cases involving more than $10,000 brought under the Tucker Act. Therefore, as developed more thoroughly hereinafter, if the District Court's ruling is permitted to stand as precedent, not only will the federal departments and agencies be subject to the differing laws of the fifty states in handling trade secrets, but also the trade secret owner will be permitted to choose both his forum, Court of Claims or the district courts, and the law to be applied, federal law or state law. This would clearly be an anomalous result.

The conclusion that appellees' cause of action, in essence, is based upon the alleged breach by NASA of an implied contract follows from the nature of the obligations which result from the disclosure of a trade secret "in confidence". Perhaps the clearest

definition of the precise nature of these obligations is provided by an annotation in American Law Reports beginning at 170 A. L. R. 449 (1947). There it is stated:

> "The most common ground for relief is that the disclosure to defendant . . . was made 'in confidence', by which is meant not simply that plaintiff placed confidence in the disclosee but that by force of the circumstances, if not of the language used by the parties, the disclosee impliedly obligated himself to respect the confidence. The basis of relief is actual or threatened breach of the obligation of an implied contract. . . . (170 A. L. R. at 475-76) (Footnotes omitted.)"

The Government's position that the District Court lacks jurisdiction over appellees' cause of action is supported:

(1) By the only previous decisions construing the scope of the Federal Tort Claims Act in the context of trade secret law: Fulmer v. United States, 83 F. Supp. 137 (N. D. Ala. 1949) and Atkiebolaget Bofors v. United States, 93 F. Supp. 131 (D. D. C. 1950), aff'd. 194 F. 2d 145 (D. C. Cir. 1951).

(2) By a recent decision of the Court of Claims holding the Government liable under the Tucker Act for disclosing to persons outside the Government

confidential information submitted under what the Court of Claims held to be an implied-in-fact contract to use this information only for inspection purposes: Padbloc v. United States, 161 Ct. Cl. 369, 137 U. S. P. Q. 224 (Ct. Cl. 1963).

(3) By the decision of this Court in the leading case of Woodbury v. United States, 313 F. 2d 291 (9th Cir. 1963).

(4) By discussions of the questions presented in this appeal in the literature: see, for example, Kostos, Unauthorized Use of Technical Data in Government Contracts: Remedies of the Data Owner, 6 Boston College Ind. and Com. L. Rev. 753, 756 (Summer 1965) and Note, 55 Dickinson L. Rev. 301, 313 (1951).

I

THE ONLY PREVIOUS DECISIONS CONSTRUING THE SCOPE OF THE FEDERAL TORT CLAIMS ACT IN TRADE SECRET CASES SUPPORT THE POSITION THAT THE DISTRICT COURT LACKS JURISDICTION.

Soon after enactment of the Federal Tort Claims Act it was decided in Fulmer v. United States, 83 F. Supp. 137 (N. D. Ala. 1949), that an action against the United States could not be sustained under the Federal Tort Claims Act to recover for the

alleged unauthorized disclosure and use of an unpatented invention or a trade secret. In the Fulmer case, the plaintiff alleged that he had,

> " ' . . . entered into an oral agreement with officers, agents, servants or employees of the defendant' pursuant to which plaintiff disclosed to defendant his 'device, plan, means or method for bomb sight indicating chart for aircraft' upon the promise of said representatives of defendant 'that said disclosure would be treated in confidence, that such disclosure would not be revealed to the public or otherwise be appropriated, [and] that defendant would pay to the plaintiff for the use of said device, invention, means or method the reasonable value of same'." (83 F. Supp. at 138).

Plaintiff further alleged that subsequently,

> " ' . . . defendant in a publication prepared by it . . . did publish plaintiff's said invention, plan, means or method' and that since said publication was designed and intended for the instruction of the military forces of the defendant, 'defendant has actually used said invention, device, plan, means or method of plaintiff'." (85 F. Supp. at 138-39).

Several grounds for jurisdiction were argued, including the Federal Tort Claims Act. The Court rejected all of these, and

granted the Government's motion for a summary judgment. In commenting on the Federal Tort Claims Act, the Court noted:

> "While the Federal Tort Claims Act does not, in terms, either include or exclude claims arising out of the alleged use of unpatented inventions, its very silence on the subject effectively excludes such claims." (83 F. Supp. at 151).

Notwithstanding the Fulmer decision, the Aktiebolaget Bofors Company, in Aktiebolaget Bofors v. United States, 93 F. Supp. 131 (D. D.C. 1950), aff'd. 194 F.2d 145 (D.C. Cir. 1951), brought an action against the United States to recover damages for what plaintiff contended was the illegal use by the United States of a secret process owned by plaintiff. Plaintiff alleged that the United States violated an agreement or license under which the U.S. Navy was to receive a disclosure by plaintiff of this process and was to use the process to make and use a so-called Bofors gun only in the United States, and only for the use of the United States. The United States, plaintiff contended, subsequently manufactured large quantities of the Bofors gun and furnished many to friendly powers under the so-called Lend-Lease Act, and other similar statutes, in violation of the agreement, for which plaintiff demanded damages in the amount of $2,000,000. The Government moved to dismiss the complaint on the ground that the District Court was without jurisdiction,

> ". . . in that the claim sought to be asserted

is one for breach of contract, while the jurisdiction of this Court in actions against the United States for breach of contract is limited to claims involving not more than $10,000. The Court of Claims alone has jurisdiction over actions against the United States for breach of contract involving an amount in excess of that sum." (93 F. Supp. at 133).

The plaintiff contended, on the other hand, that the action sounded in tort and that the District Court had jurisdiction under the Federal Tort Claims Act. The District Court granted the Government's motion to dismiss the complaint, relying on the Fulmer case, which it regarded as being "on all fours with the case at bar". In affirming this decision, the Court of Appeals summarized the law of trade secrets in the context of the Federal Tort Claims Act:

> "The owner of an unpatented trade secret has a property right in it as long as he does not disclose it. His right to the exclusive use of it depends upon the continuance of secrecy. Any person who obtains the secret from him by theft, bribery, stealth, breach of a confidential relation or other unlawful means violates his property right and commits a tort. As Judge Holtzoff said in his opinion in this case, 'So long as the secret remains intact, any one who invades it, is guilty of a tortious act.'

"The tort lies in the wrongful acquisition. But one who has lawfully acquired a trade secret may use it in any manner without liability unless he acquired it subject to a contractual limitation or restriction as to its use. In that event a licensee who uses the secret for purposes beyond the scope of the license granted by the owner is liable for breach of contract, but he commits no tort, because the only right of the owner which he thereby invades is one created by the agreement of disclosure. The owner could not maintain a suit against him for damages arising from unlicensed use without pleading and proving the contract. This being true, the gist of the owner's action is the breach of the licensing agreement.

"Here the Navy Department acquired the secret lawfully. Subsequent unauthorized use by the United States was, therefore, not tortious. It follows that the complaint in case No. 10870 did not state a cause of action in tort. Moreover, 28 U.S.C. §2680(h) excepts from those claims upon which the Government may be sued under the Federal Tort Claims Act 'Any claim arising out of . . . interference with contract rights.' " (194 F. 2d at 147, 148).

Applying the principles of the Bofors decision to the present case, appellees do not contend that the officers and employees of NASA acquired the so-called "Space Propulsion Concept" unlawfully.

Instead it is admitted that appellees submitted this concept to these officers and employees voluntarily, in the form of a proposal, and that after this submission "from time to time plaintiffs communicated with NASA concerning said concept and discussed said concept with NASA, its officers and employees" [R. 29]. Appellees, accordingly, base their claim on the allegations (1) that the NASA "officers and employees . . . received and accepted said concept to consider, study, keep, hold and retain on a secret and confidential basis" [R. 29], and (2) that they subsequently breached this agreement. Appellees could not maintain a suit against the Government without proving an agreement or promise, either express or implied, that the concept would be retained on a confidential basis. This being true, the gist of the action is that the NASA officers and employees breached this agreement. 3/

Both the Fulmer case and the Bofors case, therefore, stand for the principle that the Federal Tort Claims Act does not confer jurisdiction upon the district courts in actions against the Government for the alleged unauthorized disclosure of trade secrets. In Bofors there was a written license agreement involved, and following the District of Columbia Court of Appeals decision

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3/ As stated in Corpus Juris Secundum, "a licensee of an unpatented trade secret who uses the secret beyond the scope of the license granted by the owner, although liable for breach of contract, commits no tort, or, as it is otherwise stated, no tort is committed by one who uses information previously embraced in the secret, if the disclosure was obtained by lawful means," 86 C.J.S. Torts §48 (1954). This view, published after the Bofors case, is somewhat different from the 1939 Restatement of Torts view quoted supra at footnote 1.

in Bofors, a successful action against the United States was maintained by the Aktiebolaget Bofors Company in the Court of Claims for breach of this license agreement. Aktiebolaget Bofors v. United States, 153 F. Supp. 397 (Ct. Cl. 1957). In Fulmer, the Court held based upon the evidence that there was no contracts, either express or implied, which would provide a basis for recovery under the Tucker Act.

Except for the present action, the Fulmer case and the Bofors case appear to be the only instances where a plaintiff based an action against the United States for the unauthorized disclosure of a trade secret upon the Federal Tort Claims Act. And the Bofors case is cited in the literature as standing for the principle that such an action may not be based upon this Act. See, for example, Kostos, Unauthorized Use of Technical Data in Government Contracts: Remedies of the Data Owner, 6 Boston College Ind. and Com. L. Rev. 753, 756 (summer 1965) and Note, 55 Dickinson L. Rev. 301, 313 (1951). Kostos draws a distinction between tangible and intangible property and concludes that the Federal Tort Claims Act "does not embrace certain torts which interfere with the intangible rights of the injured party [e. g., his rights in trade secrets], as distinguished from damage to his property or person".

II

THE COURT OF CLAIMS HAS HELD THAT IT HAS JURISDICTION UNDER THE TUCKER ACT IN AN ACTION INVOLVING THE UNAUTHORIZED DISCLOSURE OF PROPRIETARY INFORMATION SUBMITTED TO THE GOVERNMENT BY A PROSPECTIVE CONTRACTOR UNDER AN IMPLIED CONTRACT RESTRICTING DISCLOSURE.

In Padbloc Co. v. United States, 161 Ct. Cl. 369, 137 U.S.P.Q. 224 (Ct. Cl. 1963), the Government was held liable under the Tucker Act for disclosing to persons outside the Government confidential information disclosed to the Government by a prospective contractor under what the Court of Claims held to be an implied-in-fact contract that the Government would use this information only for inspection purposes.

In that case, plaintiff offered to permit the Army Chemical Corps to have access to the plaintiff's secret plans and processes for packaging fire bombs if the Chemical Corps would designate plaintiff's package for fire bombs as the only approved alternate to a Chemical Corps package on future procurements of fire bombs until 104,000 packaged fire bombs had been delivered to or ordered by the Government, at which time the plaintiff would grant the Government a royalty-free license under its patents and "know-how". Almost immediately after this proposal was drawn up in the New York office of the Chemical Corps in the form of a letter dated May 28, 1954 and signed by plaintiff (it was not signed by anyone on behalf of the Government), the Government amended the

existing bid - invitation to designate plaintiff's package as the approved alternate unit. Subsequently, a contracting officer wrote plaintiff on June 7 asking for authority to inspect plaintiff's pending patent application and for all other material promised, in response to which plaintiff promptly supplied the requested authority and information. Not long thereafter, it was determined that plaintiff's package and not the Chemical Corps package best met the Government's requirements; whereupon the Government had plaintiff's drawings copied and given to other fire-bomb contractors together with other information obtained from plaintiff. Plaintiff then sued the Government both for breach of contract and patent infringement. The Court of Claims found the "contract count decisive" (161 Ct. Cl. at 371).

As a preliminary matter, the Court held that whether there was a contract or not "is not to be measured by state law (the parties seem to think that New York law controls) but by the uniform federal 'common law' which governs the contracts of the United States. . . . As always, the federal contract law we apply should take account of the best in modern decisions and discussion." (161 Ct. Cl. at 377) (Citations omitted).

In response to the Government's contention that there was no formal contract between the parties, the Court stated:

> " . . . it is wholly appropriate (and fully in accord with reality) to read the defendant's letter of June 7th, although it did not say so in words, as impliedly promising to abide by that provision when the

information was forwarded. That is certainly what plaintiff reasonably thought and what the defendant had every reason to believe the plaintiff would think. The defendant, for its part, could not reasonably assume that it would receive plaintiff's secret data without any interim obligation to protect their secrecy." (161 Ct. Cl. at 378).

The court then concluded, applying federal common law, that "plaintiff justifiably assumed that its confidence would not be violated and that the defendant would respect the limitations clearly placed on the use of plaintiff's drawings and other material. The contemporary rules of contract law permit that reasonable expectation to be fulfilled." (161 Ct. Cl. at 379). Based upon this construction, the Court held the Government liable under the Tucker Act for the breach of an implied bilateral contract.

Appellees' allegations and the facts of the Padbloc case are quite analogous. In Padbloc the plaintiff submitted proprietary information to the Government in the hope of receiving a procurement contract. Appellees allege that their so-called "Space Propulsion Concept" was submitted to NASA in the form of a proposal looking toward the award of a NASA contract (R. 28). The court in Padbloc held in view of the circumstances of the case that the Government was under an implied obligation to retain plaintiff's data in confidence. Appellees allege that:

"At the time plaintiff Meckel submitted said

concept to NASA, and on many occasions thereafter, plaintiffs have advised NASA, its officers and employees, that said concept was secret and confidential, was a trade secret and the proprietary right of plaintiffs and requested NASA, its officers and employees, not to disclose the same outside of Government. At all times involved herein, NASA, its officers and employees while acting within the scope of their office or employment, received and accepted said concept to consider, study, keep, hold and retain on a secret and confidential basis." (R. 29).

Accordingly, if appellees' allegations can be supported, and if appellees are able to prove a confidential relationship resulting from a binding implied-in-fact contract or agreement between appellees and NASA, then under the Padbloc decision an action could be maintained in the Court of Claims under the Tucker Act. On the other hand, if appellees are unable to prove a confidential relationship founded upon a contract or agreement with NASA which may be implied under the circumstances, then it is the Government's position that their cause of action must fail.

III

THE DECISION OF THIS COURT IN THE LEADING CASE OF WOODBURY v. UNITED STATES SUPPORTS THE GOVERNMENT'S POSITION THAT THE DISTRICT COURT LACKS JURISDICTION OVER APPELLEES' ACTION.

The rationale underlying the Fulmer case, the Bofors Court of Appeals decision, and the Padbloc case was perhaps best articulated by this Court in the leading case of Woodbury v. United States, 313 F. 2d 291 (9th Cir. 1963). In this case, plaintiff contended that the United States Housing and Home Finance Administration (HHFA) had breached a fiduciary duty, and that the breach of such a duty was a tort under the Federal Tort Claims Act, even though the fiduciary duty may have been created by contract. In affirming the district court's dismissal of the action for lack of jurisdiction, this Court defined what it regarded as the essential distinction between actions brought against the United States for breach of contract and those which may properly be maintained in tort:

> "Appellant argues persuasively and at length that breach of fiduciary duty is a tort, even though the duty may be created by contract, and that nowhere in the Federal Tort Claims Act is such a tort expressly excepted from its coverage. (See 28 U. S. C. §2680, where the exceptions are stated). We assume, for the purposes of this decision, but do not decide, that

these arguments are sound as far as they go. A number of cases are cited in support of the proposition that the coverage of the Federal Tort Claims Act is not limited to the 'ordinary common-law type of tort'. We have no quarrel with them, but we are still of the view that appellant does not have a case under the Act.

"Under the federal statutes, jurisdiction of the courts over contract claims against the Government is different from jurisdiction over tort claims. Contract claims are covered by the Tucker Act, adopted in 1887 (ch. 359, 24 Stat. 505) and now appearing, as amended, in 28 U.S.C. §1491, which confers upon the Court of Claims jurisdiction over 'any claim against the United States . . . founded . . . upon any express or implied contract with the United States . . . in cases not sounding in tort'. The district courts have concurrent jurisdiction of such cases under 28 U.S.C. §1346(a)(2), but only when the claim does not exceed $10,000. Jurisdiction over tort claims against the Government is made 'exclusive' to the district courts by 28 U.S.C. §1346(b).

"The law applied under the two statutes also differs. It has long been established that the law to be applied in construing or applying provisions of government contracts is federal, not state law. . . .

It is clear to us that, on principle, federal law must govern the interpretation and application of a contract which is the basis for jurisdiction in an action under the Tucker Act, and it has been so held. . . . The Federal Tort Claims Act expressly provides for liability of the United States for torts 'under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred'. (28 U.S.C. §1346(b)). Under this Act, therefore, state law, not federal law, controls. Thus to permit the result here sought would give to the plaintiff not only a choice of forum (district court rather than Court of Claims where over $10,000 is sought), but also a choice of law.

"Many breaches of contracts can also be treated as torts. But in cases such as this, where the 'tort' complained of is based entirely upon breach by the Government of a promise made by it in a contract, so that the claim is in substance a breach of contract claim, and only incidentally and conceptually also a tort claim, we do not think that the common law or local state law right to 'waive the breach and sue in tort' brings the case within the Federal Tort Claims Act. The notion of such waiver of breach and suit in tort is a product of the history of English forms of action;

it should not defeat the long established policy that government contracts are to be given a uniform interpretation and application under federal law, rather than being given different interpretations and applications depending upon the vagaries of the laws of fifty different states.

* * *

"Allowing the plaintiff to waive the breach and sue in tort would destroy the distinction between contract and tort preserved in the federal statutes.

* * *

"We do not mean that no action will ever lie against the United States under the Tort Claims Act if a suit could be maintained for a breach of contract based upon the same facts. We only hold that where, as in this case, the action is essentially for breach of a contractual undertaking, and the liability, if any, depends wholly upon the government's alleged promise, the action must be under the Tucker Act, and cannot be under the Federal Tort Claims Act. (313 F. 2d at 294-96) (Footnotes and case citations omitted).

In the present case, that the appellees' recovery is dependent upon the proof of a promise and a breach of that promise was recognized by the District Court. Summarizing the case in the first paragraph of the opinion denying the Government's motion,

the District Court stated:

> "The complaint alleges a negligent and/or wrongful disclosure by Government officials of a secret process which had been disclosed to the officials by plaintiffs for the Government's consideration under the promise by the officials not to disclose." (R. 15) (Emphasis added).

The District Court, in part at least, relied for its decision upon Aleutco Corp. v. United States, 244 F. 2d 674 (3rd Cir. 1957). This case was discussed by this Court in Woodbury in these terms:

> "To the extent that the reasoning in Aleutco Corp. v. United States, 3 Cir., 1957, 244 F.2d 674, 678-679, can be said to be contrary to the views here expressed, we decline to follow it. But we do not think that that case is really contrary to our views. It was an action for conversion of property -- 'a classic case in tort' -- as the court stated. We think that in Aleutco the action was essentially one sounding in tort, while here the action is one essentially sounding in contract. There, the breach of contract, if any, was a mere background for the tort -- refusal of the government to permit the plaintiff to take possession of property that it owned. The contract was not the essential basis of the claim -- rather, it came into the case as a claimed defense on behalf of the government, which asserted that plaintiff, by breach of

> contractual arrangements with the government, had forfeited its right to the property. Not so here. Fiduciary duty or not, there can be no liability in this case unless Woodbury can prove (1) an express or implied promise by the Government, through HHFA, to adopt and carry out a permanent long range plan to finance the project and (2) a wrongful breach of that promise." (313 F. 2d at 296-97).

So too in the instant case, there can be no liability unless appellees can prove (1) an express or implied promise by NASA not to disclose appellees' so-called "Space Propulsion Concept" outside the Government and (2) a wrongful breach of that promise.

Notwithstanding the authority cited by the Government, the District Court held that " . . . if the facts alleged in plaintiffs' complaint and memorandum are such that Ohio law -- where the transaction occurred -- would allow recovery in tort, this court does have jurisdiction" (R. 17). But this misses the point of the Woodbury case, and the other cases cited above. In Woodbury, this Court did not look to the law of the state where the alleged breach of the fiduciary relationship took place to see if this breach was considered to be a tort; quite the opposite, the Court assumed this to be so, but held as a matter of law that where a claim against the United States is founded in essence upon the breach of a promise by the Government, the matter was not within the scope of the Federal Tort Claims Act. Similarly, in United States v. Smith, 324 F. 2d 622 (5th Cir. 1963), and in Blanchard v. St. Paul

Fire & Marine Insurance Co., 341 F. 2d 351 (5th Cir. 1965), cert. denied, 382 U. S. 829 (1965), cited by the District Court, the Fifth Circuit Court of Appeals did not look to the state law to determine whether the action complained of was regarded as a tort or a breach of contract, in turn, to determine whether there was jurisdiction under the Federal Tort Claims Act, since state law becomes relevant only if it is first determined that jurisdiction exists under the Federal Tort Claims Act.

United States v. Smith, supra, is quite relevant. In this case, six subcontractors who performed work for a government prime contractor sued the United States under the Federal Tort Claims Act on the ground that a government contracting officer negligently failed to require a payment bond from the prime contractor as required by statute. The Court of Appeals reversed a district court decision rendering judgment against the United States on the ground that the action could not be sustained under the Federal Tort Claims Act. In commenting on the intent of Congress in enacting the Federal Tort Claims Act, the Court quoted at length from the Woodbury decision and concluded that the common law or local state law right to "waive the breach and sue in tort" did not bring the case within the Federal Tort Claims Act.

The Smith case is particularly pertinent in view of the similarities between the allegation in that case and appellees' allegations. In Smith the plaintiffs based their action on the allegation that a government contracting officer negligently failed to include the payment bond in the prime contract in violation of a

federal statute. In the instant case, appellees contend that employees of NASA negligently disclosed appellees' so-called "Space Propulsion Concept" in violation of the provisions of 18 U. S. C. 1905, quoted supra and in violation of NASA regulations. In this connection it should be emphasized that under 28 U. S. C. 1346(a)(2) and 28 U. S. C. 1491 claims in excess of $10, 000 founded on Federal statute or regulation as well as those founded on express or implied contract with the United States are not included within the jurisdictional grant made to the district courts but are placed within the exclusive jurisdiction of the Court of Claims.

The importance of applying a federal standard under the Tucker Act -- (1) in interpreting Federal statutes and regulations and in construing any alleged agreement or confidential relationship between appellees and NASA in this action or in determining whether there was such an agreement, (2) in establishing whether there was a breach of any agreement, and (3) in fashioning an appropriate remedy -- is underscored by the fact that NASA in its procurement regulations, issued pursuant to the Armed Services Procurement Act, 10 U. S. C. 2301 et seq., provides a procedure for the submission to NASA of proposals which may contain proprietary information. NASA Procurement Regulations §3. 109, 41 C. F. R. 18-3. 109. NASA has over 30, 000 employees located at major research installations throughout the country. Over 12, 000 of these employees are scientists and engineers who may be called upon from time to time to review and evaluate a potential contractor's trade secret or proprietary information submitted in

hope of being awarded a NASA contract. NASA officials estimate that during fiscal year 1965 alone over 3,000 unsolicited proposals were submitted by private concerns to NASA for evaluation. If the duties and liabilities of NASA and its employees in handling these proposals were held to be governed by state law of unfair competition in trade secret cases, formulation of NASA-wide procedures and policies designed to accommodate all of the different standards applied by the state would be difficult if not impossible. And, of course, if the District Court's ruling were allowed to stand in the case, the precedent would apply to all departments and agencies of the Government, and the attendant problems from an operational point of view would be multiplied many times over.

CONCLUSION

For the reasons stated, it is respectfully requested that the District Court's order denying the Government's Motion to Dismiss be reversed and that the case be remanded with instructions to dismiss appellees' Amended Complaint. Alternatively, it is requested that the case be remanded to the District Court with instructions to transfer the case to the Court of Claims under 28 U. S. C. 1406(c).

Respectfully submitted,

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SPACE ADMINISTRATION.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Clarke A. Knicely

CLARKE A. KNICELY

No. 20776

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES AND THE NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,

Appellants,

vs.

PHYSICS TECHNOLOGY LABORATORIES, INC., *et al.*,

Appellees.

Appeal From the United States District Court for the Southern District of California Southern Division.

BRIEF FOR APPELLEES.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

*Erroneously referred to herein as Pabloc.

No. 20776

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES AND THE NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,

Appellants,

vs.

PHYSICS TECHNOLOGY LABORATORIES, INC., *et al.*,

Appellees.

BRIEF FOR APPELLEES.

Jurisdictional Statement.

Appellees agree with the Jurisdictional Statement of Appellants.

Statement of the Case.

Appellees do not controvert the Statement of the Case of appellants except that it does not agree with the Government's position (Appellants' Br. p. 4).

Statutory Provisions.

Appellees agree that appellants have correctly cited and quoted the statutory provisions involved.

Question Presented.

Appellees believe that appellants' statement of "Questions Presented" (Appellants' Br. pp. 7-8) inaccurately

presents the real question involved. Appellees would state it thusly:

Does an action to recover damages by reason of the "negligent and/or wrongful acts and omissions of" Government (NASA) employees in disclosing appellees' "secret and confidential . . . trade secret . . . and proprietary right" [R. 25, *et seq.*][1] to persons (competitors of appellees) outside Government arise *ex contractu* and, therefore, establish jurisdiction in the United States Court of Claims under the Tucker Act, [28 U.S.C. 1491], or does it arise *ex delicto* and, therefore, establish jurisdiction in the United States District Court under the Federal Tort Claims Act [28 U.S.C. 1346(b)]?

Argument.

Appellees' Amended Complaint [R. p. 25, *et seq.*] alleges, among other things, "At all times involved herein, NASA, its officers and employees while acting within the scope of their office or employment, received and accepted said concept to consider, study, keep, hold and retain on a secret and confidential basis." Seizing upon this language and ignoring the other allegations of the complaint, appellants would have this Court believe that the Government and appellees entered into a contract to keep the secret. This is far from the facts of the case.[2] This allegation should be construed in light of the other allegations of the amended complaint to mean what it states and nothing more—certainly *not* that it establishes a contractual relationship between the parties.

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[1]Record references are indicated thusly: "R. p. .....".

[2]Appellees refer to language in the original complaint using the word "agreed" (eliminated in the Amended Complaint) to bolster their claim of "contract" (Appellants' Brief, p. 4).

There was no contract within the meaning of 28 U.S.C. §1491 (as amended) which provides, "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases *not sounding in tort*" (emphasis supplied). The jurisdiction of the Court of Claims upon any express or implied contract with the United States means actual contracts, either express or implied in fact.[3] *State of Alabama v. United States* (1931), 282 U.S. 502. The Court of Claims has jurisdiction of all actions *ex contractu* but not of actions *ex delicto, Ingram v. United States* (1897), 32 Ct. Cl. 147, reversed on other grounds 172 U.S. 327. The liability of the Government in actions on contract, is simply that which the claimant might pursue against another defendant in another Court, *Deming v. United States* (1865), 1 Ct. Cl. 190, appeal dismissed 76 U.S. 145.

Appellees' claims in this case are not based on any contract expressed or implied but rather on a tort—breach of confidence—which in this case is founded on the common-law tort of breach of confidence, the violation of the statute 18 U.S.C. §1905 and the violation of the regulations of appellants,[4] any one or all of which

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[3]The phrase "not sounding in tort" prevents a claimant from waiving a tort and suing *ex contractu*, even in a case where he could have done so at common law. *McArthur v. U.S.* (1894), 29 Ct. Cl. 194. See, also, *Castelo v. U.S.* (1916), 51 Ct. Cl. 221.

[4]As to regulations concerning disclosure of confidential information, trade secrets and proprietary data, see Armed Service Procurement Regulations 4-205.1e and Title 41 C.F.R. 18-3, 109(a).

constitutes the negligent and/or wrongful acts and omissions of appellants within the meaning of 28 U.S.C. §1346(b).

We have no quarrel with the basic proposition of appellants that breach of contract claims against the United States are within the jurisdiction of the Court of Claim under 28 U.S.C. §1491, (except claims involving not more than $10,000 [28 U.S.C. §1346(a)(2)] and that the cases cited by appellants support this basic proposition.[5]

Fulmer v. United States, 83 Fed. Supp. 137 (1949), a decision of the United States District Court for the Northern District of Alabama, Southern Division, involved a claim by plaintiff that the United States "would pay to plaintiff for the use of said device, invention, means or method, the reasonable value of same" and contemporaneously therewith agreed that plaintiff's "disclosure would be treated in confidence, that such disclosure would not be revealed to the public or otherwise be appropriated." (83 Fed. Supp. 138).

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[5]We do not agree, however, that the decision of the District Court for the Northern District of Alabama, Southern Division, in the *Fulmer v. U.S.*, 83 Fed. Supp. 137 (1949) is sound in its entirety. For example, Fulmer appears to decide that where plaintiff's alleged invention had never been patented, he could not maintain an action against the United States under the Federal Tort Claims Act for damage to or loss of his "property" since an unpatented invention is only an inchoate right and in the absence of statute, no suit can be maintained for using it before the patent is issued. To the contrary, the United States Court of Appeals for the District of Columbia, *Aktiebolaget Bofors v. U.S.*, 194 F. 2d 145 (1951) held that the owner of an unpatented trade secret has a proprietary right in it so long as he does not disclose it and his right to exclusive use of it depends upon continuance of secrecy. (194 F. 2d 147), quoting from the opinion of Judge Holtzoff in the decision below, "So long as the secret remains intact, anyone who invades it is guilty of a tortious act". (*Aktiebolaget Bofors v. U.S.* (D.C. 1950), 95 Fed. Supp. 131, 133).

The *Fulmer* case clearly involved a claim of a *contract* between plaintiff and the Government "express or implied." This action does not involve such a claim. Furthermore, as pointed out, *infra,* the cases cited by appellants all involve a breach of a duty *created by and arising out of contract,* whereas the cause of action alleged in appellees' Complaint involves the breach of a duty to retain a confidence arising out of a *relationship of confidence and trust.*

The *Bofors* case, *supra,* cited by appellants involved a *contract* between the United States and Aktiebologet Bofors by the terms of which Bofors granted to the Navy Department, in consideration of the sum of $600,000, an "Exclusive and irrevocable license to make, use and have made in the United States for the United States use the Bofors 40 mm. water-cooled gun. . . .". Bofors also agreed under the contract to make full disclosure of its secret process and to furnish the services of two expert production engineers for a period of one year. Bofors based its claim under the Federal Tort Claims Act on the "transfer, under the Lend Lease Act and similar legislation, Bofors guns and ammunition to other nations to be used by them in the common war against Germany and Japan". (194 F. 2d 147). The Circuit Court for the District of Columbia held that the claim stated in the complaint was one for "breach of the licensing agreement"; "a tort claim was not stated in the Complaint"; and "it should be borne in mind that the purpose of the action was not to prevent unlicensed use of the trade secret . . . but to obtain compensation for past and future use of the secret beyond the scope of the license which had been granted" (194 F. 2d pp. 148-149).

It is important also to note that as pointed out by appellants in their Brief (pp. 17-18), a successful action against the United States was maintained by Aktiebolaget Bofors Company in the Court of Claims for *breach of contract* (Appellees' Memo. p. 11).

Appellants' Brief also cites *Pabloc Co. v. U.S.,* 161 Ct. Cl. 369, 137 U.S.P.Q. 224 (Ct. Cl. 1963). This case involved a claim by plaintiff that a contract between plaintiff and the Government had been consummated under the terms of which the Government would designate plaintiff's package for fire bombs as the only approved alternate to a Chemical Corps package on future procurements until 104,000 packaged fire bombs had been delivered to (or ordered by) the Government, whereupon plaintiff would grant the Government a royalty-free license under its patents, plus "know-how". Meanwhile, plaintiff would supply the Government with drawings, specifications and "know-how" for inspection purposes. Almost immediately after this proposal had been stated and signed by plaintiff (although not signed by the Government), the Government amended an existing bid invitation to designate plaintiff's package as the approved alternate unit. Not long thereafter, it was determined by the Government that the Chemical Corps package did not meet the Government's performance requirements while plaintiff's did. Whereupon, the Government had plaintiff's drawings copied and given to other fire bomb contractors together with other information obtained from plaintiff. As a result, the other contractors manufactured the package. The Government

argued that nothing more than an unilateral offer was contemplated and that there was no countervailing promise by the Government. (Plaintiff sought damages for violation of contract and also sought compensation for the unlicensed use of patents which were the subject of the contract). The Court of Claims found "the contract count decisive" and, in addition, held that as a part of that agreement the Government had promised to abide by plaintiff's condition that its trade secret including "know-how" would not be disclosed to anyone outside of Government until after the delivery to (or order by) the Government of 104,000 fire bombs in plaintiff's package, and ordered the case to proceed before the Trial Commissioner for the determination of damages.

It should be crystal clear that the cases cited by appellants in their memorandum (while supporting a valid proposition that claims against the United States arising out of contract, express or implied, and which are "essentially for breach of a contractual undertaking" are exclusively within the jurisdiction of the Court of Claims (if over $10,000)), are relied on by appellants in the mistaken idea of what is actually involved in this case and are completely irrelevant to the issues pleaded in the Amended Complaint. We believe that our discussion of those cases in light of the allegations of appellees' Amended Complaint here and in light of the provisions of the Federal Tort Claims Act, unerringly demonstrates that a cause of action within the jurisdiction of the District Court has been pleaded.

Appellees' Tort Claim.

Appellees' claim in this action, as we have pointed out, is based solely upon an alleged tort committed by defendants, its officers and employees while acting within the scope of their office and employment, "under circumstances where the United States, if a private person, would be liable to the appellees in accordance with the law of the place where the acts and omissions alleged by appellees occurred". (28 U.S.C. §1346.)[6] Appellees claim that appellants committed "negligent and/or wrongful acts and omissions" which are cognizable under the law of torts on three bases:

1. The violation of the common law duty to retain the trade secret and proprietary right of plaintiffs in confidence;
2. The violation of the statutory duty not to publish, divulge or disclose trade secrets under penalty of criminal sanctions (18 U.S.C. §1905); and
3. The violation of the duty imposed by Government regulations not to disclose confidential information, trade secrets and proprietary rights under Armed Services Procurement Regulations 4-205.1e and Title 41 C.F.R. 18-3, 109(a).

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[6]Appellants, in their Brief (p. 10) complain: ". . . if the District Court's ruling is permitted to stand as precedent, not only will the federal departments and agencies be subject to the differing laws of the fifty states in handling trade secrets, but also the trade secret owner will be permitted to choose both his forum, Court of Claims or the district courts, and the law to be applied, federal law or state law. This would clearly be an anomalous result." Under the Federal Tort Claims Act, are not federal departments and agencies subject to the differing laws of the fifty states concerning Negligence, Master and Servant, etc.? Furthermore, in tort cases, there is only one forum—the United States District Court.

Appellees claim that the violations by appellants of each of their duties to appellees referred to above constituted negligent and/or wrongful acts or omissions within the meaning of 28 U.S.C. §1346 and proximately caused injury or loss of property to appellees for which they seek money damages.

As stated by appellants in their Brief (p. 9, fn. 2) their common law duty to retain the trade secret or proprietary right of appellees in confidence is clearly expressed in Restatement of Torts §767 which provides as follows:

Liability for Disclosure or Use of Another's Trade Secret—General Principle

> "One who discloses or uses another's trade secret, without privilege to do so, is liable to the other if (a) he discovered the secret by improper means, or (b) his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him. . . ."

Concerning clause (b), the Restatement comments:

> "A breach of confidence under the rule stated in this clause may also be a breach of contract which subjects the actor to liability under the rules stated in the Restatement of Contracts. But whether or not there is a breach of contract, the rule stated in this Section subjects the actor to liability if his disclosure or use of another's trade secret is a breach of the confidence reposed in him by the other in disclosing the secret to him. The chief example of a confidential relationship under this rule is the relationship of principal and agent . . . But this confidence may exist also in other situations. For ex-

> ample, A has a trade secret which he wishes to sell with or without his business. B is a prospective purchaser. In the course of negotiations, A discloses the secret to B solely for the purpose of enabling him to appraise its value . . . [In such a case] B is under a duty not to disclose the secret or use it adversely to A."

To emphasize that the duty not to disclose appellees' secret may arise as a matter of tort law rather than out of a contract, the Restatement of Torts in a subsequent comment appearing in §767 states that (such) "duty not to disclose may arise out of a contract made by him *or it may be based on the rules stated in Clauses (a), (b) and (d)*[7] *of this Section.*"

The facts as alleged in appellees' Amended Complaint fall squarely within the example described in the preceding "Comment on Clause (b)": "A (Appellants) has a trade secret (Propulsion by Sputtering Concept) which he wishes to sell with or without his business. B (NASA and the United States Government) is a prospective buyer. In the course of negotiations (submission of proposals), A (Appellees) discloses the secret to B (Government and NASA) solely for the purpose of enabling him (Government and NASA) to appraise its value."[8]

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[7]"(d) he learned the secret with notice of the facts that it was a secret and that its disclosure was made to him by mistake."

[8]Parenthetical matters supplied.

The Law of Ohio.

Appellees bring their action and invoke the jurisdiction of this Court under the Federal Tort Claims Act. Having established jurisdiction, to prove their case, appellees need but establish that the cause of action set forth in their Amended Complaint involves negligent and/or wrongful acts which constitute a tort for which the Government, if a private person, would be liable under the law of the state in which the act or omission complained of occurred (and that said tort proximately caused injury or loss of property to appellees, and the money damages flowing therefrom). The act or omission complained of occurred at the Lewis Research Center, Cleveland, Ohio. The act or omission complained of is the wrongful and/or negligent disclosure in the state of Ohio by the officers and employees of NASA and the U. S. Government of a confidence responded in them by appellees (while acting within the scope of their office or employment). Ohio law recognizes the existence of a confidential relationship not arising out of contract: "A confidential relationship may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another." *State ex rel. Shriver v. Ellis* (App.), 49 O.L. Abs. 161, 75 N.E. 2d 704 (1947). "It may be natural or defacto or legal and formal". *Taylor v. Shields* (App.), 64 O.L. Abs. 193, 111 N.E. 2d 595. "The relationship of confidence and trust . . . is not confined to those well-known relations of trustee and beneficiary, guardian and ward, and attorney and client. It applies to every case where . . . confidence is reposed and betrayed." *Smith v. Patterson*, 33 O.S. 70. See also discussion and cases collected in 23 Ohio Jur. 2d 539, *et seq.*

Ohio law recognizes the existence of a trade secret as a property right and provides for its protection against invasion by breach of trust. *Owens Mach. Co.* (App.), 10 O.L. Abs. 367. Ohio Courts will enjoin the disclosure of a secret mechanical idea, the knowledge of which was obtained in confidence. *Recording and C. Mach. Co. v. Neth,* 7 ONP NS 217, 19 ODNP 169, 80 N.E. 1129. See also discussion and cases collected in 52 Ohio Jur. 2d 417, *et seq.* Thus, we see that Ohio law recognizes and confirms the existence of the tort described in subparagraph (b) of §757 of Restatement of Torts.

Ohio also acknowledges that the violation of a specific criminal statute or ordinance may be the basis for a civil claim for damages and may constitute negligence *per se.* Under Ohio law, appellees need but prove the appellants' violation of §1905 of Title 18, United States Code in order to establish appellants' negligence as a matter of law. "Negligence *per se* is a violation of a specific requirement of law or ordinance, the only fact for determination by the jury being the commission or omission of the specific act inhibited or required." "Conduct violative of specific legislative requirement is illegal, and if it proximately results in injury to one to whom the duty is owed, the transgressor is liable for the resulting damage." See discussion and cases collected in 39 Ohio Juris. 2d 550, *et seq.*

Woodbury v. United States.

Appellants rely most heavily on the decision of this Court in *Woodbury v. United States,* 313 F. 2d 291 (C.A. 9, 1963). This case was held to involve a cause of action for *breach of a contractual undertaking* and any

action, if maintainable, must be brought in the Court of Claims under the Tucker Act.

This case involved a claim by plaintiff (and the trial court so held (192 Fed. Supp. 924) that in connection with the "contractual obligation" to provide financing for the construction of a housing project there existed "an implied obligation of HHFA (Housing and Home Finance Agency) to arrange for or provide long-term financing, and that it did not do so" (313 F. 2d 294). Plaintiff asserted a contract (within HHFA's contractual obligations to him) not "express", but "implied". Plaintiff termed it a breach of HHFA's fiduciary duties. The United States District Court for the District of Oregon dismissed the action for lack of jurisdiction holding that if there was a breach of fiduciary duties, such a breach was not the "ordinary common-law type of tort" contemplated by the Federal Tort Claims Act (313 F. 2d 294). On appeal, it was argued by appellant that breach of fiduciary duty is a tort "even though the duty may be created by contract". This Court stated with regard to this argument, "We assume, for the purposes of this decision, but do not decide, that these arguments are sound as far as they go." A number of cases are cited in support of the proposition that the coverage of the Federal Tort Claims Act is not limited to the "ordinary common-law type of tort". We have no quarrel with them, but we are still of the view that appellant does not have a case under the Act" (313 F. 2d 294-295). This Court pointed out that jurisdiction of the courts over contract claims against the Government is different from jurisdiction over tort claims. The first is lodged in the Court of Claims under 28 U.S.C. §1491 and the second, in the

United States District Courts under 28 U.S.C. §1346-(b). This Court also pointed out that the law to be applied in construing or applying provisions of Government contracts is federal and the law to be applied under the Federal Tort Claims Act is state (313 F. 2d 295). The Federal Tort Claims Act expressly provides for liability of the United States for torts "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred" [28 U.S.C. §1346(b)].

This Court stated,

> "Many breaches of contract can also be treated as torts. But in cases such as this where the tort complained of is based *entirely* upon breach by the Government of a promise made by it in a contract, so that the claim is in substance a breach of contract claim, and only incidentally and conceptually also a tort claim, we do not think that the common law or local state law right to waive the breach and sue in tort brings the case within the Federal Tort Claims Act" (Emphasis supplied, 313 F. 2d 295).

This Court carefully pointed out,

> "We do not mean that no action will ever lie against the United States under the Tort Claims Act if a suit could be maintained for a breach of contract based upon the same facts. We only hold that where, as in this case, the action is essentially for breach of a contractual undertaking, and the liability, if any, depends wholly upon the Government's alleged promise, the action must be under the Tucker Act and cannot be under the Federal Tort Claims Act. . . . Fiduciary duty or not, there

> can be no liability in this case unless Woodbury can prove (1) an express or implied promise by the Government, through HHFA, to adopt and carry out a promised long-range plan to finance the project and (2) a wrongful breach of that promise" (313 F. 2d 296-297).

The following statement appearing in the penultimate paragraph in the Court's decision is enlightening,

> "Since it appeared in oral argument that Woodbury also has a case pending in the Court of Claims, the case being held in abeyance pending our decision, we see no need for transferring this case to that court under 28 U.S.C. §1406(c)."

The *Woodbury* decision carefully explains that "the law to be applied in construing or applying provisions of government contract is federal, not state law" and that, under the Federal Tort Claims Act, "state law, not federal law, controls" (313 F. 2d 295). There, appellant argued, ". . . that breach of fiduciary duty is a tort, even though the duty may be created by contract . . ." (313 F. 2d 294).

This Court points out,

> "The notion of such waiver of breach and suit in tort is a product of the history of English forms of action; it should not defeat the long established policy that government contracts are to be given a uniform interpretation and application under federal law, rather than being given different interpretations and applications depending upon the vagaries of the laws of fifty different states." (313 F. 2d 295).
>
> "Allowing the plaintiff to waive the breach and sue in tort would destroy the distinction between

> contract and tort preserved in the federal statutes. As the Supreme Court said in Feres, supra, at 139, 71 S.Ct. at 156, the Tort Claims Act 'should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole.' It has been repeatedly held that one having a claim against the government that is essentially one sounding in tort may not 'waive the tort and sue in assumpsit,' thereby bringing his claim under the Tucker Act as one upon a contract with the United States, even though he could have done so under local law if he were asserting the same claim against a private party." (313 F. 2d 296).

It should be beyond question upon reading the allegations of the Amended Complaint [R. p. 25, *et seq.*], in their entirety that appellees' claim is not based "entirely" or even partly "upon breach by the Government of a promise made by it in a contract" (313 F. 2d 295). *No contract (express or implied) with the Government is involved.* And, appellants cannot distort the language of a single phrase taken out of context to create one. As in the case of *Aleutco Corporation v. United States* (C.A. 3, 1957, 244 F. 2d 674, 678-679) cited and discussed by this Court in the *Woodbury* case (313 F. 2d 296-297) this is a "classic case in tort."

The case of *United States v. Smith* (C.A. 5, 1963, 324 F. 2d 622), discussed by appellants in relation to the *Woodbury* decision (Appellants' Br. pp. 29-30) is not in point. There, six subcontractors who performed work for a Government prime contractor, sued the United States under the Federal Tort Claims Act on the

ground that the Government contracting officers failed to require a payment bond from the contractor under the Miller Act, 40 U.S.C. §270a, before execution of the prime contract. The absence of such payment bond made it impossible for the subcontractors to collect for the materials and labor furnished by them on the job. The trial court held that the failure of the contracting officers for the Government to obtain such bond violated the Miller Act.

Concerning the alleged violation of the Miller Act, the 5th Circuit held, "We do not need to decide whether the Miller Act placed on the United States Government a duty to the supplier of labor and materials in a public contract to see to it that the bond required of the contractor be executed prior to the letting of the contract . . ." (324 F. 2d 624).

The Court concluded,

> "We think that it (the Federal Tort Claims Act) indicates clearly that Congress did not intend to permit the suit against the United States for the contract price of a construction project remaining unpaid by the contractor merely because under the laws of some of the states, a state or municipality might be subject to such liability for the protection of such unpaid creditors on state public contracts."

The Court then cited and quoted from the *Woodbury* case, including the statement,

> ". . . where the 'tort' complained of is based entirely upon breach by the Government of a promise made by it in a contract, so that the claim is in substance a breach of contract claim, and only incidentally and conceptually also a tort claim, we

> do not think that the common law or state law right to waive the breach and sue in tort brings the case within the Federal Tort Claims Act."

It may be noted that appellants, after twisting and torturing the single phrase of the Amended Complaint referred to, *supra.* p. 2, in trying to emphasize the importance of a decision here, state:

> "NASA has over 30,000 employees located at major research installations throughout the country. Over 12,000 of these employees are scientists and engineers who may be called upon from time to time to review and evaluate a *potential contractor's* trade secret or proprietary information submitted *in hope of being awarded a NASA contract.* NASA officials estimate that during fiscal year 1965 alone over 3,000 *unsolicited proposals* were submitted by private concerns to NASA for evaluation." (Emphasis supplied, App. Br. pp. 30-31).

This is precisely the status of appellees. They were a *potential contractor;* they had submitted their trade secret and proprietary right in the form of an *unsolicited proposal in hope of being awarded a NASA contract.* Appellees were *not awarded a NASA contract.* NASA tortiously disclosed their trade secret and proprietary right.

It is respectfully submitted that the Order of the District Court should be affirmed.

Dated: September 12, 1966.

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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

RICHARD M. RAND

NO. 20776

IN THE UNITED STATES COURT OF APPEALS

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REPLY BRIEF FOR APPELLANTS

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SPACE ADMINISTRATION

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NO. 20776

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES AND THE NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,

Appellants,

vs.

PHYSICS TECHNOLOGY LABORATORIES, INC., et al.,

Appellees.

REPLY BRIEF FOR APPELLANTS

SUMMARY OF ARGUMENT IN REPLY TO APPELLEES' BRIEF

The arguments and authorities set forth in appellees' Brief do not refute the Government's position that if an action may be maintained against it arising out of the facts alleged in the Amended Complaint, such action may not be based upon the Federal Tort Claims Act, but may be maintained only under the Tucker Act either (1) for the breach of an express or implied contract or agreement between appellees and NASA, or (2) as a claim "founded either upon . . . any Act of Congress, or any regulation of an executive department". 28 U.S.C. 1491.

As to (1) above, the Government has not "seized" upon the

specific language of the Amended Complaint in challenging the jurisdiction of the District Court, as contended by appellees. Nor does the Government construe appellees' claim as being based upon a formal written contract between them and NASA. Instead, the Government's position follows from the conclusion that there can be no liability in the present case unless appellees can prove, first, a promise by NASA, either express or implied, not to disclose appellees so-called "Space Propulsion Concept" to persons outside the Government, and secondly, a wrongful breach of that promise. As stated in the annotation quoted in the Government's Brief (p. 11), in cases where a party claims that a trade secret disclosed "in confidence" was later disclosed to others in breach of the confidence, "the basis of relief is actual or threatened breach of the obligation of an implied contract. . .". 170 A. L. R. 449, 475 (1947). Appellees' action, therefore, is essentially for the breach of an express or implied agreement or contract, and as such, may be founded only upon the Tucker Act.

As to (2) above, appellees contend that employees of NASA negligently disclosed appellees' so-called "Space Propulsion Concept" in violation of the provisions of 18 U. S. C. 1905 and in violation of NASA regulations. 1/ This adds support to the Government's position on jurisdiction. Under 28 U. S. C. 1346(a)(2) and 28 U. S. C.

1/ Appellees refer to the Armed Services Procurement Regulations, which apply only to the Department of Defense. The NASA Procurement Regulations appear at 41 C. F. R. 18-1. 100 et seq. For the purpose of this Appeal, the differences between the two are not pertinent.

1491 claims in excess of $10,000 founded on Federal statute or regulation, as well as those founded on express or implied contract with the United States, are not included within the jurisdiction of the district courts but are placed within the exclusive jurisdiction of the Court of Claims under the Tucker Act.

Appellees cite no case in which an action for the unauthorized disclosure of a trade secret was successfully maintained under the Federal Tort Claims Act. Indeed, all the cases in point, including Fulmer v. United States, 83 F. Supp. 137 (N.D. Ala. 1949), Aktiebolaget Bofors v. United States, 93 F. Supp. 131 (D. D.C. 1950), aff'd 194 F.2d 145 (D.C. Cir. 1951), Padbloc Co. v. United States, 161 Ct. Cl. 369, 137 U.S.P.Q. 224 (Ct. Cl. 1963), and Woodbury v. United States, 313 F.2d 291 (9th Cir. 1963), all cited and discussed in the Government's Brief, support the Government's position that the District Court erred in refusing to grant the Government's Motion to Dismiss or alternatively to transfer the case to the Court of Claims under 28 U.S.C. 1406(c).

CONCLUSION

It is respectfully requested that the District Court Order denying the Government's Motion to Dismiss be reversed and that the case be remanded with instructions to dismiss appellees' Amended Complaint. Alternatively, it is requested that the case be remanded to the District Court with instructions to transfer the case to the Court of Claims under 28 U. S. C. 1406(c).

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this reply brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing reply brief is in full compliance with those rules.

/s/ Clarke A. Knicely

CLARKE A. KNICELY

Nos. 20785 and 21377

In the

United States Court of Appeals

For the Ninth Circuit

THE WESTERN PACIFIC RAILROAD COMPANY and the SOUTHERN PACIFIC COMPANY, suing on their own behalf and on behalf of all other railroads similarly situated,

Appellants,

vs.

HOWARD W. HABERMEYER, THOMAS M. HEALY, and A. E. LYON, individually and as members of the Railroad Retirement Board, et al.,

Appellees.

Opening Brief for Appellants

Appeals from the District Court for the Northern District of California, Southern Division

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JURISDICTIONAL STATEMENT

These are two appeals which were consolidated for briefing and oral argument by the November 2, 1966, Order of this Court. Both appeals are from orders of the United States District Court for the Northern District of California which were entered in a

single action then pending below. Appeal No. 20785 is from the November 24, 1965, order of the District Court denying appellants' motion for a preliminary injunction. Appeal No. 21377 is from the September 13, 1966, order of the District Court denying appellants' renewed motion for a preliminary injunction, granting appellees' motion for summary judgment, and entering final judgment against appellants.

The underlying action was brought by appellants, suing on their own behalf and on behalf of all other railroads similarly situated, to obtain a declaration concerning the unlawfulness of certain unemployment benefits being paid by appellees from the Railroad Unemployment Insurance Account, as well as preliminary and permanent injunctions against such payments (R. 1-31).* The District Court's jurisdiction was invoked under the provisions of 28 U.S.C. Sections 1337 and 1331(a) (1964), (R. 4). Timely notices of appeal were filed with respect to each of the District Court's decisions (R. 148, 255), and the jurisdiction of this Court therefore rests upon 28 U.S.C. Sections 1291 and 1292(a)(1) (1964).

STATEMENT OF THE CASE

1. Introduction

This is an action for declaratory relief with respect to the lawfulness of very substantial unemployment benefits paid and being paid by appellees from the Railroad Unemployment Insurance Account (R. 1-31). Plaintiffs and appellants are the Western Pacific Railroad Company and the Southern Pacific Company, suing on their own behalf and on behalf of all other railroads similarly situated. Appellants represent over 775 railroads which operate more than ninety-five percent of the total railroad mileage in the United States, and which contribute more than eighty-five

*All record references in this brief are to the clerk's transcript as included in the Transcript of Record in this Court. As the decisions of the District Court were based entirely upon written materials, there is no reporter's transcript.

percent of all funds paid into the Railroad Unemployment Insurance Account by carriers (R. 2-3, 188). Defendants and appellees are the members of the Railroad Retirement Board, the Regional Directors of that Board, and certain of its administrative personnel. The unemployment benefits which are challenged in this action are being paid to certain firemen, known as "C(6) firemen," whose jobs were eliminated under the terms of an award of a special arbitration board convened in 1963 pursuant to joint Congressional resolution (R. 31a-v).*

Under the terms of the Award (R. 31 i-k; App. A, pp. 1-2), each of the C(6) firemen, after receiving notice that his particular job had been eliminated, was given the choice of accepting a "comparable job," with retention of all seniority rights and with guaranteed earnings for five years, or of rejecting that job, forfeiting all "seniority rights and relations," and receiving, in lieu thereof, a severance allowance averaging more than $5,600 (R. 9). Thousands of the C(6) firemen who were offered and had rejected the comparable jobs thereafter made application for unemployment benefits to be paid out of the Unemployment Insurance Account (R. 18, 171, 189-90). Over the objections of the railroads (R. 18-19), appellees have paid and are now paying very substantial unemployment benefits to such firemen—to date, the payments have admittedly come to more than $2,500,000 (R. 18, 199-200, 228).

Appellants contend that the payment of these benefits was and is in manifest violation of the disqualification provisions of the Railroad Unemployment Insurance Act,† the statute from which appellees draw their authority; that in making these payments, appellees failed and are now failing to follow the mandatory

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*Public Law 88-108, 77 Stat. 132 (1963). The relevant provisions of the arbitration award are set forth in Appendix A of this brief.

†52 Stat. 1094 (1938), as amended, 45 U.S.C. §§ 351-67 (1964), as amended, 45 U.S.C. §§ 351-404 (Supp. 1966). The relevant provisions of the Act are set forth in Appendix B of this brief.

procedural provisions of the Act, which require "findings of fact" with respect to each claim for benefits; and that, as a consequence of these matters, the payments were and are in excess of the jurisdiction of the Board (R. 1-31).

2. The Railroad Unemployment Insurance System

The Railroad Unemployment Insurance System was established and is defined by the Railroad Unemployment Insurance Act (hereinafter referred to as "the Act"). The Act, in summary, provides for the establishment of an Unemployment Insurance Account (hereinafter referred to as "the Account") to be maintained by the contributions of the employers (Sections 8, 10); for the payment of unemployment benefits from the Account to persons qualified for such benefits (Sections 2-4); for the claims procedures relating to the application for such benefits (Section 5); and for the administration of the Account and the determination of eligibility for and payment of such benefits by the Railroad Retirement Board (hereinafter referred to as "the Board"), an organization previously established by the Railroad Retirement Act of 1935 (Section 12). All "carriers" within the meaning of the Interstate Commerce Act and all employees of those carriers are defined, respectively, as "employers" and "employees" who are subject to the Act. Section 1(a),(b),(d). Appellants and all of the members of the class of railroads on whose behalf this action has been brought are employers subject to the Act who contribute to the Account (R. 2-3).

Under the terms of the Act, unemployment benefits cannot be paid to an employee unless he is "able to work and is available for work." Section 1(k). Nor can benefits be paid to an employee who falls within the "Disqualifying Conditions" of Subsection 4 (a-2) of the Act, which provides in relevant part:

> "(a-2) There shall not be considered as a day of unemployment, with respect to any employee—

"(i) (A) subject to the provisions of subdivision (B) hereof, *any of the days in the period beginning with the day with respect to which the Board finds that he left work voluntarily,* and continuing until he has been paid compensation of not less than $750 with respect to time after the beginning of such period;

"(B) *if the Board finds that he left work voluntarily with good cause, the provisions of subdivision (A) shall not apply . . . .*

"(ii) *any of the thirty days beginning with the day with respect to which the Board finds that he failed, without good cause, to accept suitable work available on such day and offered to him,* or to comply with instructions from the Board requiring him to apply for suitable work or to report, in person or by mail as the Board may require, to an employment office." (Emphasis added.)

Thus, under the terms of the Act, an employee is disqualified to receive unemployment benefits if the Board finds that "he left work voluntarily," unless it also finds that he "left work voluntarily with good cause." And even if there is a finding that a man left work voluntarily but with good cause, he is nevertheless disqualified for a thirty day period if the Board finds that "he failed, without good cause, to accept suitable work available . . . and offered to him." It should be noted that, as Section 4(a-2) strongly suggests, the Board is under a statutory duty to make findings of fact with respect to the conditions of eligibility. Section 5(b) in effect so provides:

"5(b) The Board is authorized and directed to make findings of fact with respect to any claim for benefits and to make decisions as to the right of any claimant to benefits."

The Railroad Unemployment Insurance Account, the fund from which unemployment benefits under the Act are paid, is maintained almost entirely by the contributions of the employers subject to the Act. No payments whatever are made into the

Account by the employees, and the payments may not be passed on to the employees. Section 8(g). Appellants and the other members of the class of railroads whom they represent contribute approximately eighty-five percent of all funds paid into the Account (R. 188). During fiscal years 1960-64, the total annual contributions to the Account have ranged between approximately $144,000,000 and $153,000,000 (R. 85), and the contributions by the class appellants represent have therefore varied between approximately $122,400,000 and $140,000,000 annually.

In theory at least, the percentage rate of contributions required of appellants and other employers should fluctuate up or down, depending upon the total amount of money currently standing in the Account. Section 8(a). Since 1950, however, the balance standing in the Account has diminished from a surplus of approximately $780,000,000 to a deficit of approximately $250,000,000,* a reduction amounting to more than one billion dollars. As the Account has wasted away, the rate of contribution required of employers has, since 1955, steadily and irreversibly increased. 20 C.F.R. § 345.2(a) (1966). By 1963, and despite the fact that the then maximum statutory rate of contribution had been in effect since June of 1959 (and had even been raised temporarily during 1962), it had become apparent that the deficit in the Account could not be eliminated or significantly reduced without permanently raising the contribution rate; and, in Public Law 88-133, 77 Stat. 222 (1963), Congress once again raised the maximum rate of contribution, this time to an all-time high of four percent. This is the rate at which contributions presently are being made by appellants and by all other members of the class on whose behalf this action has been brought (R. 22). Mr. Thomas M. Healy, one of the members of the Railroad Retirement Board, has predicted that any increased deficit in the Account will

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*Railway Express Agency, Inc. v. Kennedy, 189 F.2d 801, 805 (7th Cir. 1951), *cert. denied*, 342 U.S. 830 (1951); R. 84; Railroad Retirement Board, The Monthly Review, Vol. 27, No. 10 (Oct. 1966).

not only postpone the date upon which contribution rates may be decreased under the terms of the Act, but may well result in action by Congress to increase the rate of contribution in order to reduce or eliminate the deficit (R. 200).

3. The Arbitration Award

For several years prior to 1963, the Nation's railroads and the Railroad Brotherhoods representing their firemen struggled unsuccessfully to resolve the conflict between the economic imperative of eliminating unneeded firemen jobs and the employment dislocations and human hardships which could result from such changes. Finally, and in August of 1963, Congress took the matter in hand and directed that the issues be formally resolved by a special arbitration board. Public Law 88-108, 77 Stat. 132 (1963). The arbitration board was convened on September 11, 1963 (R. 31b). The carriers and the employees were each represented by two arbitrators and the remaining three arbitrators were named by the President of the United States. The Board received presentations from the United States Secretary of Labor and held public hearings for a period of twenty-nine days during November of 1963. On November 26, 1963, the Board entered its formal award, after "a full consideration of the evidence and arguments upon the entire record" (R. 31d).

Under the terms of the Award, the only positions to be eliminated were those of certain of the "firemen (helpers)" on non-steam freight engine crews and on yard engine crews (R. 31e). With respect to such crews, each carrier was authorized to give to the local union chairmen lists of those existing engine crews which, in the judgment of the carrier, did not require the services of a fireman (R. 31e). The local chairmen then had the right to designate up to ten percent of such crews as to which the continued use of firemen would nevertheless be required (R. 31e-g). Thereafter, the carrier was authorized to separate from

service all firemen on any crews other than those designated subject, however, to the rights given to such firemen under subsequent provisions of the Award (R. 31g).

The rights of the firemen whose jobs were to be eliminated depended primarily upon length of service (R. 31g-k). The rights of those men presently involved—firemen having more than two and less than ten years' seniority—are described in paragraph C(6) of the Award (R. 31i-k; App. A., pp. 1-2). These "C(6) firemen," as they have come to be called, were to retain all their rights to engine service assignments unless and until "offered by the carrier another comparable job (such as, but not limited to, engineer, fireman (helper), brakeman, or clerk in the same or another seniority district) for which they are, or can become qualified."* The offer of the "comparable job" was to include relocation expenses, accumulated seniority rights for purposes of vacations and other fringe benefits, and guaranteed annual earnings for a period of five years. If any man rejected a comparable job, the Award provided that he should: "[F]orfeit all of his employment and seniority rights and relations" and receive, in lieu thereof, a specified severance allowance. With respect to the average C(6) fireman, the severance allowance was something in excess of $5,600 (R. 9).

4. The Conduct of Appellees

The arbitration award was issued on November 26, 1963. Thereafter, thousands of C(6) firemen elected to terminate and forfeit their employment relationships and to receive the severance allowance provided in the Award.† Complete figures are

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*Thus, the "comparable job" which was offered, could be of equal or greater dignity than the job eliminated. Moreover, under paragraph D(2-3) of the Award, men who stayed on with the railroads in comparable jobs had the right to work as firemen to the extent that such positions became available in the future (R. 31 l-m).

†Most of these men had been offered and had rejected comparable jobs under the procedure contemplated by the Award but some had elected to

available only to the Board, but it is undisputed that between May 7 and October 31, 1964, alone, more than 3,200 C(6) firemen—about eighty-three percent of all those affected by the Award (R. 190)—elected to give up their work for the railroads, and that these 3,200 firemen collectively received in excess of $17,000,000 as severance allowances (R. 9). During the benefit year commencing July 1, 1964, more than 2,850 of the C(6) firemen who had taken the severance allowance filed claims with the Board for unemployment benefits payable from the Account (R. 18), and 1,000 further claims were filed during the benefit year commencing July 1, 1965 (R. 227).

It will be recalled that the Act forbids the payment of unemployment benefits to a man if "the Board finds that he left work voluntarily," unless the Board also finds that his leaving was "with good cause" (Section 4(a-2) (i)); that a man is also temporarily disqualified if "the Board finds that he failed, without good cause, to accept suitable work available . . . and offered to him" (Section 4 (a-2) (ii)); and that the Board, under the terms of the statute, is "directed to make findings of fact with respect to any claim for benefits" (Section 5 (b)). Despite the command of the statute, no individual findings of fact were ever made by the Board or by any of its employees with respect to the qualification or disqualification for unemployment benefits of any single one of the more than 3,000 C(6) firemen who had applied for unemployment benefits (R. 10-12, 16-17, 91-92). Nor were the individual circumstances of these men even considered by the Board in determining their eligibility for benefits (R. 91-92, 199-200). Instead, and on June 5, 1964, one H. L. Carter, Director of Unemployment and Sickness Insurance of the Board, issued a memorandum to the Board's Regional Directors which purported to eliminate altogether the disqualification problem under Section 4(a-2) (R. 31w-x).

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leave their work with the railroads and to receive the severance allowance even before comparable jobs had become available for offer to them (R. 16).

The Carter memorandum was in the form of a blanket ruling, applicable to all firemen covered by the Award, without reference to the particular circumstances. To eliminate the possibility that some men, in electing to "terminate their employment and seniority rights and relations" under the provisions of the Award might be held to have "left work voluntarily" without "good cause," the memorandum simply provided that a man's choice of "separation from service," with receipt of a severance allowance "will not affect his rights to unemployment benefits under the Railroad Unemployment Insurance Act" (R. 31w). To eliminate the possibility of temporary disqualification for failure to accept, as "suitable work," the comparable jobs which had been offered, the memorandum concluded that a C(6) fireman who rejected a comparable job "is not to be regarded as having failed to accept suitable work within the meaning of Section 4(a-2) (ii) of the Act" (R. 31w). The Carter memorandum did not purport to explain the basis for these rulings. Nor did it suggest or imply that anything further was to be done—either by way of findings of fact or otherwise—in order to determine the qualification for benefits of individual C(6) firemen who had rejected the comparable jobs and taken the severance allowances.

In fact, nothing further was ever done to comply with the procedural provisions of the statute, either by the Board or by any of its employees. It is admitted that, following the receipt of the Carter memorandum and pursuant to its instructions, the persons charged with the initial determination and payment of claims simply assumed, without any consideration of the individual circumstances, and without any findings of fact in that regard, that none of the C(6) firemen who had rejected a comparable job and taken a severance allowance could thereby be disqualified for unemployment benefits (R. 16-17, 91-92, 199-200).

Though more than $2,500,000 has already been paid out to C(6) firemen pursuant to the instructions in the Carter memo-

randum (R. 18, 199-200, 228), it appears that neither that memorandum, nor the advice which it contains, was ever formally considered by the Board. The most that can be said, according to a December 10, 1964, letter from appellee Howard W. Habermeyer, Chairman of the Board, is that, at some unspecified time, "the Board did informally approve the policy underlying [the Carter memorandum]" (R. 31 ah). The Habermeyer letter, however, went on to say:

> "It should be noted, however, that while the Management Member of the Board concurs generally in the view that the receipt by a fireman of severance allowances under the Award does not prevent the payment to him of unemployment benefits under the Act, he is of the opinion that matters of eligibility with respect to a claimant of benefits should be considered on an individual basis in each case." (R. 31ah-ai)

Neither appellants nor any other railroads were advised of issuance of the Carter memorandum (R. 18). Nor were any of the railroads given notice of the claims for benefits made by any of the C(6) firemen or given an opportunity to participate in or to be heard in connection with the adjudication of any of those claims (R. 18).* The Association of American Railroads, a voluntary non-profit organization whose members include appellants and the entire class they represent, objected repeatedly to the Board concerning the payment of unemployment benefits to the C(6) firemen without prior compliance with the mandatory procedural provisions of the Act (R. 18). But, by a two-to-one majority, the Board declined to alter the instructions contained in the Carter memorandum (R. 18-19, 31ah-ai).

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*Indeed, the Board has consistently taken the position that, except where the employment relationship of the applicant is in dispute, the employers have no right to be heard in connection with proceedings relating to the allowance of claims for benefits. See the October 18, 1950, letter of Mary B. Linkins, Secretary of the Board, as set forth in the Transcript of Record, pp. 15-16, Railway Express Agency, Inc. v. Kennedy, 342 U.S. 830 (1951).

5. The Proceedings Below

On October 25, 1965, appellants commenced this action, alleging that, by failing to make findings based upon the individual circumstances concerning the eligibility of the C(6) firemen for unemployment benefits, the Board was violating the mandatory procedural provisions of its governing statute and thereby acting in excess of its statutory jurisdiction (R. 1-31). Appellants prayed for a declaration concerning the unlawfulness of the payments made and being made to the C(6) firemen, and for preliminary and permanent injunctions against any further payments (R. 27-30).

On November 23, 1965, the District Court filed its "Memorandum of Decision" (R. 138-146)* denying appellants' motion for a preliminary injunction. Though the court found that "substantial sums" were being paid out each week to the C(6) firemen (R. 141), it nevertheless declined to issue an injunction to preserve the status quo pending the final determination of the case. The court's ruling was based upon findings that the Board had acted within the limits of the "discretion vested in it by law" (R. 143) and that there was "no substantial possibility" that appellants would be able to establish that they had standing to review the actions of the Board (R. 144). At the time of the denial of the preliminary injunction, the unemployment benefits being paid to the C(6) firemen were on the order of $20,000 to $25,000 each week (R. 21, 227-28).

Believing that the findings and the decision of the District Court were in error appellants filed a timely notice of appeal (R. 148) and Appeal No. 20785 followed. At the same time, appellants renewed their motion for a preliminary injunction, presenting additional materials intended to show that the Board had not, in fact, exercised any discretion, statutory or otherwise,

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*The District Court's decision is reported at 248 F. Supp. 44 (N.D. Cal. 1965).

and that appellants had an obvious and justiciable interest in the unlawful waste of the Account (R. 188-201, 203-07). The renewed motion for a preliminary injunction, along with appellees' motions to dismiss or for summary judgment, were submitted for decision on April 22, 1966 (R. 262). As of that date, the unemployment benefits currently being paid out were on the order of $12,750 each week (R. 228).

No decision by the District Court was announced until July 10, 1966, over eleven weeks after the date of submission (R. 262). The court then issued its further "Memorandum of Decision" (R. 233-34) which denied, without further discussion, the renewed motion for a preliminary injunction "for the reasons set forth" in the earlier memorandum. Appellees' motion for summary judgment was granted, the court finding that the Board had acted within its discretion and that appellants had no standing to sue. Appellees were directed to prepare and submit findings, conclusions and a formal written judgment.

Appellees' proposed findings, conclusions, and judgment were promptly disapproved by appellants (R. 244, 263) who thereafter served and filed their proposed modifications (R. 235-41). The modifications were rejected, and appellees' drafts were signed by the District Court without substantial change on September 9, 1966 (R. 244-54). Judgment was entered on September 13, 1966, and Appeal No. 21377 followed (R. 263). Pursuant to stipulation of counsel and the November 2, 1966, order of this Court, the two appeals have been consolidated here for briefing and oral argument.

SPECIFICATION OF ERRORS RELIED UPON

1. The District Court erred and abused its discretion in denying appellants' original motion for a preliminary injunction.

2. The District Court erred and abused its discretion in denying appellants' renewed motion for a preliminary injunction.

3. The District Court erred in granting appellees' motion for summary judgment, in dismissing appellants' action with prejudice, and in entering final judgment against appellants.

4. The District Court erred in finding that the C(6) firemen who accepted the severance allowance and thereafter applied for unemployment benefits "were unable to secure other employment." (R. 247) There is no evidence in the record to support this finding.

5. The District Court erred in finding that the Railroad Retirement Board (as opposed to Mr. Carter) made on June 5, 1964, a "general ruling" with respect to the eligibility of the C(6) firemen for unemployment benefits (R. 250), and in failing to find, as was proposed by appellants (R. 237), that neither the Board nor any of its employees ever even undertook to consider the individual facts and circumstances relating to the eligibility of any of the C(6) firemen for such benefits. The finding made is erroneous and the finding proposed is fully supported by the record. These matters lie at the heart of the case, and the refusal of the District Court to make proper findings concerning them necessarily undercuts the rationale of its decisions.

6. The District Court erred in finding that the issuance of a preliminary injunction would "adversely" affect the interests of the public and the C(6) firemen (R. 251). There is no evidence in the record to support this finding.

7. The District Court erred in finding that there was, in this action, "no genuine issue as to any material fact" (R. 234) and in concluding that summary judgment was therefore appropriate (R. 234, 254). Upon the view of the case taken by the District Court—that the conduct of the Board was shielded from judicial review by the doctrine of administrative discretion—a principal factual issue was whether the Board had properly and deliberately exercised its discretion. In view of the conflicting evidence

and contentions of the parties, the court should have ordered a trial of this issue on the merits. Instead, it improperly resolved the conflict in favor of appellees and entered summary judgment against appellants.

8. The District Court erred in concluding that appellees had acted "within the limits of discretion vested in them by law." (R. 252) The Board had no "discretion" to ignore the mandatory procedural provisions of its governing statute as it did when it failed to make specific findings of eligibility in cases where eligibility necessarily turned upon the factual circumstances of each individual case. Nor had it "discretion" to misconstrue the substantive provisions of the Act in a manner contrary to its language and its manifest purpose.

QUESTIONS PRESENTED

1. Can it be determined, as a matter of law, and without any investigation of the individual circumstances, that of the more than 3,000 C(6) firemen who elected to reject comparable jobs, accept the severance allowance, and thereby forfeit all of their seniority rights and relations, no single fireman could possibly have been found to have "left work voluntarily" without "good cause"?

2. Can it be determined, as a matter of law, and without any investigation of the individual circumstances, that of the more than 3,000 "comparable jobs" offered to such firemen, no single job could have constituted "suitable work" which might have been rejected "without good cause"?

3. Is the Board free to ignore the provisions of its governing statute directing it "to make findings of fact" with respect to eligibility for benefits in situations where eligibility necessarily depends upon the facts and circumstances of each particular case?

4. Do appellants have standing to complain of the unlawful waste by appellees of the funds in the Account, when appellants represent the carriers contributing more than eighty-five percent

of all funds paid into the Account, when the Account, during the last fifteen years, has wasted away by an amount in excess of one billion dollars while appellants' contribution rates have been repeatedly increased to make up the deficit, and when, if appellants have no standing to complain, the unlawful acts of appellees can never be reviewed at all?

5. Is the conduct of the Board wholly immune from judicial review in circumstances where the Board chooses to violate the mandatory procedural provisions of its governing statute and to act in excess of its statutory jurisdiction?

6. Was summary judgment proper when, in the view of the case taken by the District Court, a dispositive question was whether the Board had acted within its "discretion" and when the material facts at issue included matters crucial to the determination of that question?

SUMMARY OF ARGUMENT

1. The Payment of the Unemployment Benefits to the C(6) Firemen Was Contrary to Statute and in Excess of the Jurisdiction of the Board.

Section 4(a-2) of the Act provides that a man is disqualified for unemployment benefits if he "left work voluntarily" without "good cause," or if he "failed, without good cause, to accept suitable work." Sections 4(a-2) and 5(b) of the Act expressly require the Board, prior to the payment of unemployment benefits, to make "findings of fact" with respect to each of these matters.

It is undisputed that each of the C(6) firemen elected, of his own free choice, to terminate his employment with the railroads, and that most of those firemen, in connection with their decisions, rejected comparable jobs which might clearly have constituted suitable work. It is also undisputed that, despite the command of the statute, the Board, in determining the C(6) firemen eligible for unemployment benefits, never even undertook to determine,

upon the basis of the individual facts, whether any of the firemen, in voluntarily leaving work and in rejecting the comparable jobs, had acted without "good cause" and were thereby disqualified under the provisions of the Act. It therefore follows that the payment of the benefits to the C(6) firemen was and is contrary to statute and in excess of the statutory jurisdiction of the Board.

Appellees now attempt to justify their conduct by urging two quite startling interpretations of the statute which supposedly eliminate all disqualification problems under Section 4(a-2): that "work," within the meaning of the Act, refers not to the employment relationship, but rather to the specific duties upon which a man might from time to time be engaged; and that a desire to receive a severance allowance necessarily constitutes "good cause," in every case, for rejecting suitable work. These proffered interpretations of the statute are entitled to no weight here for at least three reasons: they formed no part of the administrative ruling pursuant to which the benefits in issue were paid and under which their legality must necessarily be determined; they are wholly at odds with the language and manifest purpose of the Act, and must therefore be rejected; and, even if correct, they would fail to dispose of the need to consider the individual circumstances which would still remain crucial to the eligibility of many of the C(6) firemen.

2. The District Court Had Power to Review, at the Instance of Appellants, the Unlawful Actions of the Board.

Appellees argue that, for a number of technical reasons, neither this nor any other court can ever review the actions of the Board or restrain it from proceeding in willful violation of the mandatory procedural provisions of the statute creating its power to act. Each of appellees' arguments, including those accepted by the District Court, is wholly without merit:

(a) *Standing.* The District Court, in concluding that appellants had no standing to challenge the unlawful diversion of the

Account, improperly analogized appellants and other employers under the Act to general federal taxpayers having no standing to challenge expenditures of the general federal revenues. Unlike such taxpayers, however, whose interest in the general federal Treasury is minute and indeterminable, appellants are members of a small and definite class who contribute to a specific account earmarked for a definite purpose. The decisions of the Supreme Court of the United States and of this Court make it unmistakably clear that in such circumstances standing necessarily exists.

(b) *Administrative Discretion.* The doctrine of administrative discretion did not, as the District Court apparently concluded, preclude review on the merits of the unlawful actions of the Board. The District Court's failure to exercise its own judgment concerning the meaning and effect of the statute was erroneous for at least three separate reasons: first, the court improperly assumed, in the presence of conflicting evidence, that the Board had deliberately exercised its discretion in a manner sufficient to invoke the doctrine of limited review of administrative acts and it improperly entered summary judgment against appellants upon that assumption in violation of the express condition of Rule 56 that summary judgment is proper only when "there is no genuine issue as to any material fact"; second, the court failed to perceive that, under established rules relating to review of administrative action, it was free to reject the Board's supposed interpretation of the substantive provisions of the statute if, as seems apparent, that interpretation was erroneous; and third, the court ignored the fact that there was and could be no room for an exercise of administrative discretion with respect to the duty of the Board to follow the mandatory procedural provisions of its governing statute.

(c) *Statutory Preclusion of Review.* The courts of the United States unquestionably have power to review agency action in all circumstances where review has not been prohibited by Congress. The provisions of the Act contain no general prohibition of

judicial review of the actions of the Board, but only (in Section 5) a particular procedure for administrative and judicial review in particular and selected circumstances not presently applicable. It is settled, however, that the fact that Congress has made provisions for review of particular matters neither compels nor suggests the conclusion that it has impliedly prohibited review as to all other matters. It is also settled that where, as here, an agency has ignored the command of its governing statute and proceeded in excess of its statutory jurisdiction, an intent by Congress to preclude judicial review cannot and will not be assumed.

(d) *Sovereign Immunity.* Where, as here, officers of the United States have acted beyond their statutory powers, it is perfectly clear that an action to enjoin such conduct cannot be barred by the doctrine of sovereign immunity.

(e) *The C(6) Firemen as Indispensable Parties.* This action will in no way determine the eligibility for unemployment benefits of any one of the C(6) firemen. The action rather will establish only that the Board, in determining the matter of eligibility, must follow the mandatory procedural provisions of the statute. The firemen are plainly not indispensable parties to such a determination when, as is apparent, they will retain the right, in connection with their claims, to make whatever contentions they choose, excepting only the contention that the Board may determine their eligibility without prior compliance with the procedures established by the Act. This conclusion is strongly reinforced by the fact that there is no means by which jurisdiction over the firemen could ever be obtained and that, if they were held indispensable, no remedy could ever be granted to the present parties by any court. The rule relating to indispensability is a practical one, intended to further rather than to frustrate justice, and it will not be applied in such circumstances.

3. Appellants Were and Are Entitled to the Declaratory and Injunctive Relief Sought by Them in the District Court.

In permitting the payment of the unemployment benefits to the C(6) firemen without investigation of the individual facts which were crucial to the question of eligibility, the Board proceeded in violation of the statute and in excess of its statutory jurisdiction. Appellants were therefore entitled to the declaratory relief sought by them in the District Court. Since, however, the Board's violation of the statute is clear from the record, this Court need not remand for further proceedings but may itself grant appellants the declaratory relief to which they are entitled.

Upon the basis of the showing made by them in the District Court, appellants were clearly entitled to a preliminary injunction preserving the status quo pending the litigation. In denying preliminary relief upon the assumption that the Board had acted within its discretion and that appellants had no standing to sue, the District Court not only was mistaken upon the merits; it also failed to heed the rule of this Circuit that a court must entertain a motion for preliminary relief if there is a possibility that the plaintiff may make out a case upon the merits. The orders of the District Court denying the preliminary injunction should therefore be reversed, and the case should be remanded with directions that the District Court enter its permanent injunction forbidding the payment of any further benefits to the C(6) firemen unless and until the Board complies with the provisions of the statute requiring it to make factual determinations concerning the matter of eligibility.

ARGUMENT

1. In Determining, Without Any Consideration Whatever of the Individual Circumstances, That No C(6) Firemen Could Possibly Be Disqualified for Unemployment Benefits Under Section 4(a-2) of the Act, the Board Proceeded in Direct Contravention of Its Governing Statute and in Excess of Its Statutory Jurisdiction.

The record plainly discloses that the Board failed to perform its mandatory duty under the statute to make findings, based upon

the individual circumstances, concerning the eligibility of the C(6) firemen for unemployment benefits (R. 10-12, 16-17, 91-92, 199-200). Appellees argue (R. 142), and even induced the District Court to conclude, that:

> "The statute does not require the Board to make individual findings of fact when the right to benefits of claimants in a particular category can be determined by one finding applicable to all members of that category." (R. 252)

The argument and the conclusion are unassailable, but in the light of the present facts are wholly beside the point; for as will be seen below, the blanket rulings of the Carter memorandum did not relate to matters applicable to all C(6) firemen. Instead, they wholly ignored distinctions which were crucial to the question of eligibility and which depended almost entirely upon the individual circumstances.

A. THE BOARD FAILED TO DETERMINE, AS THE STATUTE REQUIRED, WHICH OF THE MORE THAN 3,000 C(6) FIREMEN WHO ELECTED TO REJECT COMPARABLE JOBS, TO FORFEIT THEIR EMPLOYMENT AND SENIORITY RIGHTS AND RELATIONS, AND TO ACCEPT IN LIEU THEREOF THE SEVERANCE ALLOWANCE, THEREBY "LEFT WORK VOLUNTARILY" WITHOUT "GOOD CAUSE."

The disqualification provisions of the Act provide that a man is ineligible for unemployment benefits if the Board "finds that he left work voluntarily" without "good cause." Section 4(a-2) (i). This language necessarily implies that, with respect to every application for benefits, the Board *must* make some reasonable effort to determine whether a man's leaving of work was voluntary, and if it was, whether he had good cause for doing what he did. This implication is made explicit in Section 5(b), which provides:

> "The Board is *authorized and directed* to make findings of fact with respect to any claim for benefits and to make decisions as to the right of any claimant to benefits." (Emphasis added.)

The legislative history is equally clear. See, *e.g.,* H.R. Report No. 748, 88th Congress, 1st Session, page 11 (1963):

> "Section 4(a-2)(i) as amended by the bill, would broaden the scope of this section to lengthen the disqualification period. As amended, *this section would require investigation of any claim disclosing a possible voluntary leaving of work either with or without good cause* unless the disqualification period had been terminated as above described." (Emphasis added.)

Under the terms of the Award, the C(6) firemen were given a choice of staying on with the railroads in comparable jobs, with retention of all seniority rights and guaranteed annual earnings for five years, or of rejecting the comparable jobs and taking severance allowances averaging $5,600 (R. 9, 31 i-k; App. A, pp. 1-2). There can be no doubt that the action of those firemen who decided to give up work with the railroads in return for the severance allowance was "voluntary" in whatever sense that word, as used in the statute, might conceivably be construed; for it is apparent that the choice to leave or to stay was theirs alone. Nor is there doubt that each of these men had, of his own free choice, "left work" with the railroads. The language of the Award makes this conclusion unmistakably clear, for Paragraph C(6) repeatedly provides that a fireman who elected to take the severance allowance would thereby "terminate" and "forfeit" "all of his employment and seniority rights and relations" (R. 31 i-k; App. A, pp. 1-2). Since each of the C(6) firemen, therefore, had clearly "left work voluntarily," it remained for the Board to determine, on the basis of the individual circumstances, which of those firemen applying for unemployment benefits had left work "with good cause" and would therefore nevertheless qualify. It may be assumed that some, perhaps many, of these firemen might have had good cause for leaving work: a particular comparable job might have been unsuitable, an undesirable move might have been

involved, and so on. But it also seems apparent that as to many of these men, a decision to leave could not possibly have been based upon good cause. We cannot, of course, know—in the absence of specific findings by the Board—how many of the firemen fell into each of these categories. But the conclusion is inescapable that it was the mandatory duty of the Board to explore the individual circumstances prior to the payment of unemployment benefits to the C(6) firemen; and it is admitted that this statutory duty was not performed.

How do appellees now answer the charge that the Board failed to perform its statutory duty? With a trick definition of the word "work" as used in the disqualification provisions of the Act. According to appellees, the word "work" does not refer to work for a railroad employer—to a man's general employment relationship—but to the specific duties upon which he may, at one time or another, be engaged (R. 92, 127-28, 223). Since the award hypothesizes the elimination of the *existing job* of each C(6) fireman to whom it applies, it follows (so the argument runs) that no C(6) fireman can be held to have left "work" (*i.e.,* his existing job) "voluntarily," even though he admittedly chose to give up his work with the railroad. This being so, appellees argue, none of the C(6) firemen can possibly fall within the disqualification provisions of Section 4(a-2)(i), and there was therefore no occasion for the Board to determine whether any of the firemen left work "with good cause" (R. 91-92, 127-28).

Appellants submit that appellees' present position and the definition of the word "work" upon which it is based are wholly at odds with the manifest purpose of the Act. At the risk of an elaboration of the obvious, it must be apparent that the purpose of the Railroad Unemployment Insurance System is to afford a means of subsistence and support to those railroad workers who have been, but are no longer, employed. Yet unemployment benefits cost money, and no legitimate social purpose would be served by pay-

ing such benefits to individuals able, but unwilling, to accept employment reasonably suited to their abilities and circumstances. The Disqualifying Conditions, set out in Section 4 of the Act, therefore contain a carefully balanced and interrelated series of provisions under which the legitimate needs of the railroad workmen are weighed against the social and economic imperative that benefits must not be paid where they are either redundant or not reasonably and legitimately required. Thus, Section 4(a-1)(i) contains a disqualification for fraudulent claims; Section 4(a-1)(ii) is intended to eliminate certain duplications of benefits; and Section 4(a-2)(iii) prohibits the payment of benefits to men on strike in violation of the National Labor Relations Act or of the rules of their own unions. Subsections 4(a-2)(i), (ii), the provisions presently involved, deal with the problem of the man who is unemployed through his own choice. The tentative disqualifications of men who have "left work voluntarily," or who have failed to accept "suitable work" recognize that voluntary unemployment should not be encouraged, and that the system should not be charged with its costs. Yet these considerations are to be balanced against the probability that, in at least some cases, a man's choice not to stay on with his employer might be a reasonable one, and his decision to leave might be essential to his dignity, his safety, or the well-being of his family. Thus, and even though his decision is voluntary, a man is not disqualified if he left or failed to accept suitable work with "good cause."*

Surely, any fair analysis of this statutory scheme compels the conclusion that when Congress used the words "left work voluntarily" in the provisions of Section 4(a-2)(i), it had in mind the general subject of the man's employment relationship with the

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*See also, Section 1(k) of the Act, which, as a measure complementary to the Disqualifying Conditions of Section 4 (a-2), includes, as compensable days of unemployment, only such days upon which a man "is able to work and is available for work."

railroad, and not the specific duties upon which he might from time to time be engaged. See the Hearings before the Senate Committee on Interstate Commerce, 75th Congress, 3rd Session (1938), the committee which was then considering the provisions of the Act prior to its enactment into law. In these hearings, the terms "work" and "employment" were often used interchangeably, clearly implying that the term "work" was used in the Act in its ordinary and normal sense—that of work as a railroad employee.*

This is not, of course, to say that a man's specific duties at a given time could not afford a proper basis for leaving work; if there were something unreasonable or distasteful about those duties, a decision to leave work might be made with "good cause" and disqualification would not then ensue. But, as opposed to the words "good cause," the words "left work voluntarily" necessarily focus upon the question whether the man has freely chosen to

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*See *e.g.*, pages 118-19 of the Hearings:

"MR. HAY. [Section 1(k) of the Act provides]:

Subject to the provisions of section 4 of this act, a day of unemployment, with respect to any employee, means a calendar day on which he is able to work and is available for work.

That would mean that a man would have to stand ready and willing to work. Of course, that is read in connection with Section 4.

Section 4 provides . . . that upon once leaving *employment* voluntarily, without good cause, he shall not then be entitled to unemployment benefits for a period of 30 days. . . .

THE CHAIRMAN (interposing). Suppose he does voluntarily retire and says, 'I am not going to work.' Before he is entitled to any benefits should he not go to work or show his intention to work as a *railroad employee,* because a man might voluntarily retire and then come in and get the benefits?

MR. HAY. I think, from reading that provision [Section 4] in connection with the provisions on page 5 which I read a minute ago [Section 1(k)], he would not be able to count it as a day of unemployment, because he would not be available for work." (Emphasis added.)

Compare also the obvious generality of the word "work" as used in the phrase "available for work" (Section 1(k)) and in the amplifying regulations (20 C.F.R. § 327 (1966)).

terminate his employment relationship rather than upon the factual basis for that choice, or whether the choice was justifiable.*

Not only is this interpretation of the statute most clearly in accord with the policy of the Act; it is also that which is most consistent with the obvious intent of the arbitration award. Under the terms of the Award, the C(6) firemen were given a choice—to stay on in a comparable job, or to terminate their employment relationship. If they elected to terminate their employment, they were to receive a substantial severance allowance—an allowance explicitly based upon their earnings during the preceding twelve-month period. What conceivable purpose could the severance allowance have had except to tide the men over until they were able to find other employment? But such, of course, is the precise function of the unemployment benefits. Indeed, appellees admit that this is so (R. 80). If a man can receive unemployment benefits in addition to the severance allowance, he is obviously being reimbursed twice for but a single loss.† There is no occasion to construe the statute in a fashion which would bring about such a bizarre result. According to its literal and common-sense meaning, the phrase "left work voluntarily" refers simply to a voluntary decision to leave the service of one's employer. Such a decision, of course, was made by every single one of the more than 3,000 C(6) firemen.

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*It is possible that appellees may attempt to rely upon their own Regional Operating Manual, which carefully defines "work" in a manner supposedly consistent with their present position (Section 1504.02) and which even goes on to attempt to deal with the precise situation of a resignation to take a severance allowance (Section 1504.03g) (R. 225). The difficulty, of course, is that the present version of the manual was first issued on May 1, 1965, long after this controversy had arisen (R. 197-98, 224-25), and is obviously only a *post litem motam* product. Moreover, as is pointed out in the affidavit of Mr. Healy, a member of the Board, the Board's prior practice, as well as its present practice with respect to all employees other than C(6) firemen, is to construe the word "work" as referring simply to "services for hire." (R. 196-99)

†Compare Section 4(a-1) (ii) of the Act which expressly prohibits the payment of unemployment benefits duplicating social insurance payments receivable under any other law.

Moreover, and even under appellees' interpretation of the statute, it is perfectly clear that at least some of the C(6) firemen "left work voluntarily." It will be recalled that, under the terms of the Award, the comparable jobs to be offered included, among others, those of "engineer, fireman (helper), brakeman or clerk." (R. 31 i-j; App. A, p. 1) Thus the Award contemplated that, though a fireman could be offered a different job, he might also be offered the *same* job—that of a fireman—although admittedly in connection with a different engine crew.* To say that the shift of a man from one fireman job to another would result in the elimination of his "work," within the meaning of the statute, would be to pursue technicalities to their drily logical extreme. It appears that even the Board is not prepared to go so far, for in the provisions of its current Regional Operating Manual, expressly intended to cover a resignation to take a severance allowance, the Board has ruled:

> "Section 1504.03g. *Resignation to take severance allowance.* An employee's resignation to take a severance allowance constitutes voluntary leaving of work if provisions of the agreement or plan under which the severance allowance is paid are such that the employee could have continued working for his employer in his same occupation and at the same location, with prospects for future employment not substantially diminished. Otherwise, his resignation to take the severance allowance does not constitute a voluntary leaving of work." (R. 225)

Thus, according to the Board's own regulations, a C(6) fireman offered another fireman's job at the same location would have left work voluntarily if he had elected to reject that job and to accept the severance allowance. Yet, it is admitted that the Board made no investigation whatever to determine which of the C(6) firemen

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*Under the terms of the award, 10% of the fireman jobs would be retained, even on those crews which were to be affected by it; and, of course, there were many fireman jobs—for example, those upon passenger trains—which were wholly unaffected by the Award (R. 31e-g).

had been offered such jobs, and which of them had rejected such jobs without "good cause." (R. 91-92)

But that is not the end of the matter. Although most of the C(6) firemen waited until their jobs had been eliminated in order to accept the severance allowance and terminate their employment, it is alleged in the verified complaint, and is undisputed by appellees, that, of the C(6) firemen, "some had elected to quit their jobs and receive their severance pay even before said comparable jobs had become available for offer to them under the terms of said award . . . ." (R. 16) The Award, however, expressly provides that the C(6) firemen should retain their engine service assignments "unless and until offered by the carrier another comparable job." (R. 31 i-j; App. A, p. 1) Thus, there can be no doubt whatever that at the time these particular men quit, their own jobs still existed. It therefore necessarily follows that they "left work voluntarily" even if, as appellees contend, the word "work" refers to the particular job held at the time of termination of employment rather than to the employment relationship itself.

B. THE BOARD FAILED TO DETERMINE, AS THE STATUTE REQUIRED, WHICH OF THE MORE THAN 3,000 C(6) FIREMEN WHO REJECTED OFFERS OF "COMPARABLE JOBS" THEREBY "FAILED WITHOUT GOOD CAUSE TO ACCEPT SUITABLE WORK AVAILABLE . . . AND OFFERED TO [THEM]."

Under the provisions of the Act, a man is temporarily disqualified from unemployment benefits if "the Board finds that he failed, without good cause, to accept suitable work available . . . and offered to him . . . ." Section 4(a-2)(ii). Under the Award, a C(6) fireman was to retain his existing position "unless and until offered by the carrier another comparable job." (R. 31 i-j; App. A, p. 1) With the exception of those men who terminated their employment and took the severance allowance even before a comparable job was offered to them, all of the C(6) firemen covered by the Award were offered and refused comparable jobs "such as, but not limited to, engineer, fireman (helper), brakeman,

or clerk." (R. 16, 31 i-j) Under the provisions of the Act, it was plainly the duty of the Board to determine which of the C(6) firemen had refused such comparable jobs; which of those comparable jobs constituted suitable work within the meaning of the statute; and as to those men who had failed to accept such suitable work, which of them had acted "without good cause." The Carter memorandum, however, purported to make all of this unnecessary by determining that none of the comparable jobs could possibly constitute suitable work:

> "A fireman confronted with this choice who chooses separation from service is not to be regarded as having failed to accept suitable work within the meaning of Section 4(a-2)(ii) of the Act." (R. 31 w)

This ruling was palpably erroneous. How could it conceivably be assumed that no single one of the more than 3,000 comparable jobs offered to the C(6) firemen could possibly constitute "suitable work" within the meaning of the statute? Under the terms of the Award, some of the jobs which might be offered—those as firemen—were precisely the same as those eliminated. Others—those of engineers—might even have been considered preferable. In handing down this particular ruling, Mr. Carter had obviously gone too far; and counsel for appellees have ever since been engaged in an effort to re-write history in order to make Mr. Carter's mistake more palatable. Appellees now say that Mr. Carter determined, not that none of the comparable jobs could constitute suitable work, but that none of them could possibly have been rejected "without good cause." See, *e.g.*, the November 9, 1965 "Summary of Defendants' Arguments":

> "The Board ruled that the election to take severance pay rather than another job was not a refusal of suitable work *without just cause*. The Board ruled that the Award gave the firemen, upon losing their jobs, a free election—and that if they elected to take severance pay, this was not a refusal of suitable work without just cause. Hence, whether the job was

> suitable in any given instance was immaterial, since the good cause was present in every case." (R. 79) (Emphasis in original.)

But Mr. Carter said nothing whatever in his memorandum about either "just cause" or about a "free election." His ruling was that the C(6) firemen could not, under any circumstances, "be regarded as having failed to accept suitable work within the meaning of Section 4(a-2)(ii) of the Act." (R. 31 w) No one will ever know whether the rationale now put forward by counsel for appellees ever occurred to Mr. Carter, either before or after the promulgation of his memorandum. Since all of the benefits paid to the C(6) firemen were paid upon the basis of the instructions in the Carter memorandum, however (R. 16-17, 91-92, 199-200), the validity of those payments must be sustained, if at all, upon the reasoning of that memorandum and not upon some theory invented by counsel subsequent to the event. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-69 (1962), so holds:

> "The Commission must exercise its discretion under § 207(a) within the bounds expressed by the standard of 'public convenience and necessity.' . . . And for the courts to determine whether the agency *has* done so, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' . . .
>
> Commission counsel now attempt to justify the Commission's 'choice' of remedy on the ground that a cease-and-desist order would have been ineffective. The short answer to this attempted justification is that the Commission did not so find. *Securities & Exchange Comm'n. v. Chenery Corp.*, 332 U.S. 194, 196. The courts may not accept appellate counsel's *post hoc* rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself . . . ."

But even if Mr. Carter had, in fact, made a considered determination that any C(6) fireman would have "good cause" to reject any comparable job, such a determination would plainly have been insupportable under the terms of the statute. The whole point of the disqualification provisions of Section 4(a-2) is that unemployment benefits must not be paid to men who are unwilling to work at jobs reasonably suited to their needs and abilities. Compare the provisions of Section 1(k) of the Act, which deny benefits unless a man "is able to work and is available for work." The Board cannot be permitted to emaciate the statute by attributing a meaning to the words "good cause" which could not conceivably have been contemplated by the Congress. Indeed, the *reductio ad absurdum* of the Board's present position is found in a further consideration of the application of the statute. Suppose, for example, a C(6) fireman were offered a "comparable job," as say, an engineer, and were held to have refused that job with "good cause." Suppose that, after receiving his severance allowance, the fireman were again offered the same job. There seems little doubt that the engineer's job might constitute suitable work within the meaning of the statute. But, in order to be consistent with its prior ruling, the Board must necessarily determine that a refusal of that job would have been with good cause; for except for the fact that the severance allowance had changed hands, there would be nothing about either the job or the man's personal circumstances which had changed. Yet, even the Board is apparently not prepared to go this far; for Mr. Myles F. Gibbons, its General Counsel, has stated that in such a case it would be necessary "to determine, upon consideration of all the circumstances, whether the rejection was a refusal of suitable work without good cause, or indicated a lack of availability for work on the part of the claimant." (R. 135d) Appellees' argument is therefore necessarily reduced to the proposition that a desire to receive a severance allowance averaging $5,600, must, in every case, constitute "good

cause," within the meaning of the statute, for the refusal of a job which was otherwise suitable in all respects.

Appellees seek to support this startling application of the statute by arguing that the Award gave to the C(6) firemen a "free choice" to stay on or to leave (R. 127), and that there was nothing "reprehensible from the social insurance standpoint" about the exercise of that choice (R. 92). The argument misses the mark entirely. The issue here is not whether the C(6) firemen had a right to reject the comparable jobs and to accept the severance allowances; indisputably they did. Nor is the question whether such decisions were or were not "reprehensible" in whatever sense appellees use that term; for the disqualification provisions in the Act have nothing to do with moral rectitude.* The issue here is whether, having decided to take the money and to terminate their employment with the railroads, the C(6) firemen were nevertheless entitled to receive unemployment benefits. This question must be determined upon the basis of the application of the statute to the particular situations of each of the men involved; and the determination whether a particular man had good cause to reject a comparable job plainly must depend, not upon the existence of an available windfall, but upon the nature of the job and the personal circumstances of the man who rejected it. It is admitted that the Board did not explore these matters in the case of any single one of the more than 3,000 C(6) firemen (R. 91-92).

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*See the September 13, 1963, letter of the Honorable W. Willard Wirtz, Secretary of Labor, to the Honorable Lister Hill, Chairman, Committee on Labor and Public Welfare, commenting upon the disqualification provisions of the Act:

> "[T]he unemployment insurance disqualification is not intended as a punishment for a wrongful act, but is merely a device for limiting the insured risk to exclude employment brought about by a voluntary action taken by the claimant without good cause. This principle is generally accepted, even when the disqualification is more severe than we recommend, and is accompanied by the concept that benefits should not be paid on the basis of work which the individual could have kept but for his own action taken without good cause." S. Rep. No. 510, 88th Cong., 1st Sess. 31 (1963).

II. The District Court Was in Error in Concluding That It Was Without Power to Review, at the Instance of Appellants, the Unlawful Actions of the Board.

Appellees' primary energies in the proceedings below were not directed to a defense, on the merits, of the failure of the Board to follow the procedural provisions of the statute. Instead, appellees vigorously urged a variety of technical reasons why, in their view, the District Court was without power to review the Board's actions. Thus, appellees argued that: (i) appellants were without standing to obtain judicial review of the actions of the Board; (ii) the actions of the Board are shielded from judicial review by the doctrine of administrative discretion; (iii) judicial review, at the instance of appellants, of the actions of the Board is precluded by Section 5 of the Act; (iv) this action constitutes an unconsented suit against the United States; and (v) the C(6) firemen were indispensable parties who had not been and could not be joined as defendants (R. 104, 209).

Though the District Court's two opinions and its findings and conclusions may not be entirely clear upon the matter, it appears that the sovereign immunity and indispensable parties arguments were rejected, and that the decisions were based principally, if not exclusively, upon a determination that appellants had no standing to sue and that the doctrine of administrative discretion shielded the Board's actions from judicial review (R. 143-46, 233-34, 251-52).*

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*The District Court also concluded that the Act, while providing for judicial review of some Board actions, did not authorize review of the actions challenged here—the allowance of claims for benefits in circumstances where the employment relationship was not denied (R. 143-44, 252). Since an inherent right of judicial review nevertheless exists in the absence of express statutory authorization (see Part II C, *infra*) this conclusion does not, of course, dispose of the jurisdictional question raised by appellees. It also appears that the District Court may have confused the quite separate questions whether appellants have standing to sue and whether this particular action is precluded by the statute (R. 143-44).

Since, without doubt, all of the technical arguments made by appellees in the District Court will be reasserted here, they will all be considered in this section of appellants' brief: first, those arguments which the District Court apparently found appealing, and then the rest.

A. APPELLANTS, WHO REPRESENT ALL OF THE CLASS CONTRIBUTING MORE THAN EIGHTY-FIVE PERCENT OF ALL FUNDS PAID INTO THE RAILROAD UNEMPLOYMENT INSURANCE ACCOUNT BY THE CARRIERS, CLEARLY HAVE STANDING TO CHALLENGE THE UNLAWFUL WASTE BY APPELLEES OF MORE THAN $2,500,000 OF THOSE FUNDS.

It is undisputed that:

(i) Appellees have already paid unemployment benefits to C(6) firemen in amounts substantially in excess of $2,500,000 and threaten to and will, unless enjoined, continue to make such payments in the future (R. 18, 199-200, 228);

(ii) Substantially all contributions to the Unemployment Insurance Account are made by employers and no such payments are made by employees. Section 8(a), (g). For this reason, substantially all sums paid by appellees to the C(6) firemen as unemployment benefits have been contributed by employers subject to the Act and substantially all payments made in the future to such firemen will be replaced by contributions by such employers (R. 200);

(iii) Since 1950 the Account has wasted away from a surplus of approximately $780,000,000 to a deficit of approximately $290,000,000 (R. 85) while the statutory rate of contributions required of employers has steadily and irreversibly increased to the present all-time high of four percent (Section 8(a));

(iv) Appellants represent a class including over 775 railroads which operate more than ninety-five percent of the total railroad mileage in the United States and which presently contribute more than eighty-five percent of all funds paid into the Railroad Unemployment Insurance Account by the carriers (R. 2-3, 188); and

(v) If appellants have no standing to invoke judicial review of the Board's unlawful conduct, no one has, and the interests of the railroads, the railroad employees, and the public in the proper enforcement of the statute and the integrity of the Account must remain wholly unprotected (R. 200-01).

Appellees say, however, that the injury to appellants from the unlawful waste of the Account is too remote to afford them standing to sue. Appellees argue that because the Account is now hundreds of millions in the red, because, under present rates of contributions and expenditures, that deficit may not be converted into a substantial surplus for many years, and because the present statute provides for a reduction in rates only when the surplus in the Account exceeds $300,000,000, appellants cannot until that time (estimated by appellees at thirty-five years from the present) "suffer any conceivable injury" by reason of appellees' unlawful waste of the funds in the Account (R. 77).*

This argument, however ignores the fact that it is in part because of appellees' waste of the funds in the Account in the past that the deficit and the contribution rate have inexorably increased; that it will be in part because of appellees' waste of the funds now and in the future that the deficit, if reduced at all under present contribution rates, will be reduced by almost imperceptible degrees; and finally, and most important, that unless

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*Appellees' estimates of the ebb and flow of the Account are necessarily suspect, for they have not been notably accurate in the past. The Board's present prediction that it will be thirty-five years before the contribution rate can be reduced is based upon the forecasts of its actuaries that the deficit in the Account will diminish at the rate of approximately $17,000,000 each year (R. 77, 86). In November of 1950, when the Account had a surplus of $779,067,958.79, the Director of Research of the Board, in connection with other litigation then pending, estimated that, until sometime after September of 1962, the Account would continue to have a surplus above $450,000,000. (November 1, 1950, affidavit of Walter Matscheck, set forth in full in Transcript of Record, p. 39, Railway Express Agency, Inc. v. Kennedy, 342 U.S. 830 (1951)). In fact, and by June 30, 1962, the surplus in the Account had disappeared entirely, and a deficit of more than $280,000,000 already existed (R. 85).

appellees are restrained from these and other diversions of the Account, it is probable that the contribution rate will be increased again and again in the future as it has been repeatedly increased in the past. See the affidavit of Mr. Healy, a member of the Railroad Retirement Board, who is a man in a position to know:

> "For these reasons, the improper payments already made and presently being made to the C(6) firemen could result, not only in a postponement of the date upon which the rate of contributions under the Act can be decreased but may well result in an actual increase in the contribution rates necessary to defray these and other depredations upon the Account." (R. 200)

In determining that appellants had no standing to challenge the diversion of the fund to which they, almost alone, contribute, the District Court apparently relied primarily upon the decision of the Court of Appeals for the Seventh Circuit in *Railway Express Agency, Inc. v. Kennedy,* 189 F.2d 801 (7th Cir. 1951), *cert. denied,* 342 U.S. 830 (1951) (R. 144-45). The *Kennedy* case involved a suit by Railway Express against the members of the Railroad Retirement Board seeking a declaration that certain unemployment benefits paid by the Board were contrary to the provisions of the statute. The District Court dismissed the complaint and the Court of Appeals affirmed, holding, with respect to the standing issue: (i) that the contributions of the plaintiff in *Kennedy* were merely "a type of tax" and that, as a federal taxpayer, plaintiff therefore had no standing to sue, and (ii) that the injury of which the plaintiff complained was "only a future possibility," since, under the circumstances then existing, the alleged unlawful expenditures could not affect the contribution rate for "the current years." 189 F.2d at 804-05.

Appellants respectfully submit that the *Kennedy* court was clearly wrong, even on the facts before it; and that, in any event, the reasoning of *Kennedy* cannot properly be extended to facts before this Court.

In determining that the plaintiff in *Kennedy* was simply a federal taxpayer having no standing to challenge the diversion of federal funds, the *Kennedy* court relied upon, but plainly misunderstood, the decision of the Supreme Court of the United States in *Massachusetts v. Mellon,* 262 U.S. 447 (1923). That case, it will be recalled, involved the standing of a general federal taxpayer to challenge an expenditure of the general revenues of the United States. The Supreme Court, in holding such a taxpayer to be without standing, stressed the fact that his interest was no different from that of all other taxpayers contributing to the general revenues—in the words of the Court, his "interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others." 262 U.S. at 487. Such was quite plainly not the case, however, with respect to employers such as the plaintiff in *Kennedy,* who contributed to the Railroad Unemployment Insurance Account. Those employers, unlike all other taxpayers, were contributors to a particular and specific account earmarked, not for expenditure as a part of general revenues of the United States, but for the payment of unemployment benefits to their own employees. In such circumstances, it is now and has always been the rule that the doctrine of *Massachusetts v. Mellon* can have no application. Compare *United States v. Butler,* 297 U.S. 1 (1935), a decision which involved the legality of a tax upon processors of commodities, with the resulting revenues to be used for the benefit, among others, of agricultural producers. The Supreme Court in *Butler* found *Massachusetts v. Mellon* clearly distinguishable, holding:

> "It is inaccurate and misleading to speak of the exaction from processors prescribed by the challenged act as a tax, or to say that as a tax it is subject to no infirmity. A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government. The word has never been thought to connote

the expropriation of money from one group for the benefit of another." 292 U.S. at 61.

Indeed, and upon the precise issue presented in *Kennedy, Stark v. Wickard,* 321 U.S. 288 (1944), is directly in point; for there the Supreme Court expressly held that milk producers compelled by law to make contributions, by way of deductions, to a fund maintained by the Secretary of Agriculture had standing to challenge the illegal diversion of the fund. As the Court pointed out, "It is because every dollar of deduction comes from the producer that he may challenge the use of the fund." 321 U.S. at 308. In assuming that the employers, who were virtually the only persons contributing to the Account, had no greater interest in the waste of the Account than general federal taxpayers who contributed to it not at all, the *Kennedy* court simply assumed its conclusion—a conclusion which wholly distorts the meaning of the decision upon which it relied, and which flies in the face of other decisions of the Supreme Court directed to the precise point at issue.

Even if, however, employers contributing to an unemployment account could fairly be analogized to general federal taxpayers, any reliance upon *Massachusetts v. Mellon* would fail for still an additional reason: unlike general federal taxpayers, who share with millions of others their minute interest in the expenditure of the general federal revenues, employers under the Act comprise a small and limited class whose interest in the fund to which they contribute is markedly different both in nature and in magnitude. This distinction, which escaped the *Kennedy* court, was expressly recognized by the Supreme Court in *Massachusetts v. Mellon:* for while holding that the interest of the many millions of general federal taxpayers was too "minute and indeterminable" to be judicially cognizable (262 U.S. at 487), the Court nevertheless recognized and approved its own decisions holding that where

the number of taxpayers is far smaller—as for example in the case of the taxpayers of a municipality—the interest of such taxpayers is "direct and immediate" (262 U.S. at 486), and standing therefore exists. See also *Coleman v. Miller,* 307 U.S. 433, 445-46 (1939), where the Court, in distinguishing *Massachusetts v. Mellon,* reiterated its holdings that those taxpayers—municipal and State—who pay taxes into funds more limited than that of the general federal Treasury have standing to challenge the improper expenditure of those funds.*

Indeed, this Court itself has recognized that in situations involving challenges by State, municipal, or federal taxpayers of the validity of the acts of State or territorial officials, standing clearly exists—and precisely for the reason that, since the number of such taxpayers is smaller than the number of all general federal taxpayers, the interest of each is larger and is therefore judicially cognizable. See the decision of this Court in *Reynolds v. Wade,* 249 F.2d 73, 76 (9th Cir. 1957):

> "The principle announced in Commonwealth of Massachusetts (Frothingham) v. Mellon has no application to the instant case; here, a justiciable controversy is present. The basis of the Mellon doctrine lies in the infinitestimal relationship between the Federal taxpayer and the Federal treasury. When we compare the interest of a Federal taxpayer, who is one of over one hundred and sixty million, with the interest of an Alaskan taxpayer with a population of less than 130,000, the distinction, though one of degree, is obvious. The rationale of the cases allowing taxpayers' actions against municipalities is clearly applicable in the Alaskan situation."

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*Gange Lumber Co. v. Rowley, 326 U.S. 295 (1945), upon which the *Kennedy* court also relied, is not in point either there or here. In *Gange,* the total amount involved was only $460.50, and the Court therefore properly felt that any conceivable tax burden to a general taxpayer of the State of Washington by reason of that expenditure might well be "infinitesimal" (326 U.S. at 304). In *Kennedy,* as in the present case, the sums involved were substantial and the rule of *de minimis* applied in *Gange* is therefore plainly inapplicable.

See also, to the same effect, *Smith v. Virgin Islands,* 329 F.2d 131 (3d Cir. 1964).

Thus, the relevant distinction is not, as the *Kennedy* court believed it to be, between one who pays State and one who pays federal taxes; in both the *Reynolds* and *Smith* cases, the statutory levy in question was grounded upon federal law, as was the milk producers' deduction in *Stark v. Wickard.* The distinction is rather between the minute interest of a general federal taxpayer, one among many millions, in expenditures made from the federal Treasury, and the more significant interest of one among a far smaller group who contributes to a much more restricted fund. Though some cases might present difficulties in drawing the line, it is apparent that none are present here. A State, a territory, or even a municipality may have millions of taxpayers—the State of Alaska, as indicated in *Reynolds v. Wade,* had 130,000; but the railroads contributing more than eighty-five percent of all sums paid into the Account by carriers number only 775 (R. 2-3, 139, 188). Quite plainly, therefore, the principle of *Reynolds v. Wade* and *Stark v. Wickard,* rather than that of *Massachusetts v. Mellon,* is applicable here, and should have been applied in *Kennedy.*

Finally, the *Kennedy* court concluded, as appellees argue here, that, because it cannot be predicted with absolute certainty precisely when appellants will feel the bite of the Board's unlawful conduct, appellants' injury is therefore too remote and too uncertain to present a justiciable controversy. This argument plainly flies in the face of reality, for it cannot be disputed that substantially all funds paid and to be paid into the Account have been and will be paid by the employers, and that it is the employers who must bear the burden of any unlawful waste of the Account. The argument also flies in the face of the necessary implication of all those decisions of the Supreme Court and of this Court—including *Stark v. Wickard, Coleman v. Miller,* and *Reynolds v.*

Wade—which grant standing to taxpayers contributing to funds more limited than that of the general federal Treasury. For if, in order to obtain standing to challenge improper expenditure of municipal, State, or territorial revenues, such taxpayers must demonstrate precisely when and in what amount the injury will be felt by them in increased future taxes, it is apparent that they could never prevail. Indeed, the case of those who contribute to the Account is far stronger than those who contribute by way of State or municipal taxes. For while a State taxpayer may move, may die, or may otherwise escape the future tax burden resulting from the challenged expenditures, it is clear beyond dispute that it is the employers subject to the Act who must replace the funds in the Account.

It therefore seems apparent that the *Kennedy* court was wrong upon the facts before it and under the decisions upon which it purported to rely. But even if *Kennedy* were correct upon its own facts, it could have no application here. The factual distinctions are overwhelming:

(i) In *Kennedy,* the court was considering the injury to only one employer who was thought to have only a small, individual interest in the Account and in the payments to be made from it. Here, appellants sue on behalf of 775 railroads who contribute more than eighty-five percent of all amounts paid into the Account by the carriers; and the maintenance of this action has been expressly authorized by the Association of American Railroads to which many of those railroads belong (R. 2-3, 188).

(ii) In *Kennedy,* the total amount of the benefits involved was slightly more than $128,000 (189 F.2d at 803). Here, the unlawful expenditures have already exceeded $2,500,000 (R. 18, 199-200, 228).

(iii) At the time *Kennedy* was decided, the Account had a surplus "slightly in excess of 779 million dollars" and the rate of contribution by employers was "one-half of one percent." 189

F.2d at 805. The *Kennedy* court therefore felt that "the injury of which plaintiff is complaining is only a future possibility." 189 F.2d at 805. But in the fifteen years since *Kennedy* was decided, the surplus of $779,000,000 has been converted to a deficit of $250,000,000,* and the rate of tax has increased from one-half of one percent to an all-time high of four percent (Section 8(a)). The injury which the *Kennedy* court found to be "only a future possibility" has been felt in full measure.

Surely the employers have a right to be heard concerning the unlawful diversion of a fund to which they, almost alone, contribute. Indeed, the whole trend of the recent decisions has been to afford standing to all those who have a legitimate interest in the matters concerning which they complain. See the recent decision in *United Church of Christ v. FCC,* 359 F.2d 994, 1002 (D.C. Cir. 1966), where the court, in granting standing to members of the listening public to contest the renewal of a broadcasting license, observed:

> "[T]he concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding . . . ."

There is no doubt that appellants' interest in the maintenance of the integrity of the Account is both genuine and legitimate, and that is plainly all that is required to give them standing to challenge the unlawful actions of the Board. This is particularly so where, as here, if appellants have no standing to raise the issues now presented, there is no way in which those issues can ever be raised by anyone, and no fashion in which the Board can ever be prevented by judicial process from refusing to follow the statute or from acting in excess of its jurisdiction.

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*Footnote, page 6, *supra.*

B. THE DOCTRINE OF ADMINISTRATIVE DISCRETION DOES NOT IMMUNIZE THE BOARD'S DECISIONS FROM JUDICIAL REVIEW WHERE THE BOARD'S DISCRETION HAS NOT BEEN DELIBERATELY EXERCISED, WHERE ITS INTERPRETATION OF THE STATUTE WAS ERRONEOUS, AND WHERE IT HAS PROCEEDED IN EXCESS OF ITS STATUTORY JURISDICTION.

The District Court concluded that the actions of which appellants complain "involve matters of discretion" and that the members of the Board had acted within the limits of the discretion "vested in them by law" in permitting the payment of the benefits to the C(6) firemen (R. 143, 234, 252). The District Court made no attempt to exercise its own judgment concerning the meaning and effect of the statute, apparently regarding itself bound by judicial decisions limiting the scope of review of administrative actions (R. 141-43). The court's conduct in this regard was erroneous for at least three separate reasons: first, the court improperly assumed, in the presence of conflicting evidence, that the Board had deliberately exercised its discretion in a manner sufficient to invoke the doctrine of the limited review of administrative acts; second, the court failed to perceive that it was free to reject the Board's supposed interpretation of the substantive provisions of the statute if, as seems apparent, that interpretation was erroneous; and third, the court ignored the fact that there was and could be no room for an exercise of administrative discretion with respect to the Board's duty to follow the mandatory procedural provisions of the statute.

Though the District Court's determination that the Board had properly exercised its discretion under the statute was ultimately phrased as a conclusion of law,* that determination necessarily rests upon the underlying facts as to what the Board did and what reasons it gave for its actions. If there were no dispute

*Indeed, in the District Court's November 23, 1965, Memorandum of Decision, this determination was phrased as a finding of fact (R. 143), but was recast by appellees as a conclusion of law in their proposed findings and conclusions which were signed by the District Court without substantial change (R. 252).

concerning these underlying facts, the court's determination that there was no "genuine issue as to any material fact" (R. 234) might have been proper.

Such, however, was clearly not the case. Appellees' view of the facts, as adopted by the District Court in its findings, is that on June 5, 1964 the *Board,* rather than Mr. Carter, made a "general ruling" with respect to the eligibility of the C(6) firemen, and that, at least impliedly, the *Board* on that date adopted as the reasons for its supposed "general ruling" the reasoning now put forward by appellees in support of the Carter memorandum (R. 142, 250).

Appellants' view of the facts, a view amply supported by the record, is set forth in their proposed modification to Finding 12, which suggests the elimination of the reference to a "general ruling" by the Board (R. 237), and in their proposed addition to Finding 11:

> "The June 5, 1964 memorandum was issued by a staff member employed by the Railroad Retirement Board. The memorandum was never formally considered or approved by the Board. There is evidence that the Board did at some time 'informally approve' the 'policy underlying' the memorandum. This 'informal' approval was by a two to one vote. Mr. Healy, the Board member who disagreed with the majority, felt, as plaintiffs contend, that the eligibility of a claimant for benefits should be considered on an individual basis in each case. The Board did not, in fact, ever undertake to make any findings or conclusions with respect to the qualifications of C(6) firemen based on the circumstances of any particular case. Other than the effect, if any, of its 'informal' approval of the 'policy underlying' the Carter memorandum, the Board at no time made any findings or conclusions, either of a general or of a specific character, with respect to the qualifications of the C(6) firemen to receive unemployment benefits under the terms of the Act." (R. 237)

If appellants are correct in their view of the facts, there was plainly no exercise of discretion by the Board sufficient to invoke the doctrine of limited review of administrative acts. What was before the District Court, as appellants see it, was not a reasoned, well-considered determination of fact and law by the Railroad Retirement Board. It was, instead, an *ad hoc* ruling by a staff member, replete with conclusions and devoid of reasoning or analysis, which was "informally approved" by two out of three Board members and was still later fleshed out by the accretions of explanation, amplification, and rationalization provided in the numerous papers filed by appellees in these proceedings. No one will ever know whether all or any part of what is now said in support of the Carter memorandum ever occurred to Mr. Carter or even to the Board itself at the time the Carter ruling was "informally approved." Plainly, upon this view of the facts, there was no such exercise of administrative discretion as would preclude judicial review of the propriety of payments unauthorized by the statute. See *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 167-69 (1962), quoted at length at page 30, *supra.*

If, in the view of the District Court, the doctrine of administrative discretion was somehow relevant, the court should have ordered a trial on the merits of the disputed factual issues relating to the manner in which that discretion was supposedly exercised. By accepting appellees' view of the facts, ignoring that of appellants, and entering summary judgment in favor of appellees, the District Court necessarily violated the express condition of Rule 56(c) that summary judgment may be granted only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."

Even if, however, the Board's approval of the Carter memorandum had, in fact, been a considered exercise of discretion, and even if the Board itself had then adopted the interpretation

of the Act now suggested by appellees, the propriety of the Board's action would hardly be beyond the power of the courts to review. The District Court assumed that all that was in issue was a question of law—in its own words an "interpretation of the law [Section 4(a-2) of the Act], as applied to the so-called C(6) firemen . . . ." (R. 142) The District Court apparently assumed further that it was bound to accept all of appellees' interpretations of the law, including their quite remarkable interpretations of the words "work" and "good cause" as found in Section 4(a-2) of the Act (R. 141-43). In this assumption, the court was clearly in error; for it is settled that an interpretation by an administrative body of its own governing statute will be disregarded by the courts where that interpretation is in fact unsound. See, *e.g., Social Security Board v. Nierotko,* 327 U.S. 358, 368-70 (1946); *American Ship Bldg. Co. v. NLRB,* 380 U.S. 300, 317-18 (1965); *NLRB v. Brown Food Store,* 380 U.S. 278, 290-92 (1965); *Coleman v. United States,* 363 F.2d 190 (9th Cir. 1966); Jaffee, *Judicial Control of Administrative Action,* pp. 572-79 (Little, Brown & Co. 1965).

As the Supreme Court has frequently noted, in connection with the scope of review of administrative determinations of law, a marked distinction exists between those situations in which the statutory authorization has been broadly phrased and the agency therefore "left at large," as in the case of the Interstate Commerce Act, and those situations where, as here, the statutory command is relatively precise. In the latter case, the agency must follow the statute or its order will be set aside. See, *e.g., Addison v. Holly Hill Fruit Prods., Inc.,* 322 U.S. 607, 616-17 (1944):

> "The wider a delegation is made by Congress to an administrative agency the more incomplete is a statute and the ampler the scope for filling in, as it is called, its details. But when Congress wants to give wide discretion it uses broad language. . . . In short [and in the present case] the

> Administrator was not left at large. A new national policy was here formulated with exceptions, catalogued with particularity and not left within the broad dispensing power of the Administrator. Exemptions made in such detail preclude their enlargement by implication."

The Supreme Court has been particularly assiduous in striking down erroneous administrative interpretations of statutory authority for agency action where ordinary, non-technical words—such as "work" and "good cause"—have been used and where, as is true in the present case, the meaning attributed to those words by the agency would tend to distort their ordinary meaning. See *Addison v. Holly Hill Fruit Prods., Inc.,* 322 U.S. 607, 617-18 (1944); *NLRB v. Highland Park Mfg. Co.,* 341 U.S. 322, 324-25 (1951).*

What the District Court was entitled to do, and what was indeed its duty, was to determine, not whether appellees had purported to interpret the statute, but whether their interpretation was correct. For a case which is in many respects comparable to the present, see *Social Security Board v. Nierotko,* 327 U.S. 358 (1946). In *Nierotko,* as in the present case, one of the questions at issue was the meaning of certain rather specific terms used in the substantive authorization of the agency. The precise issue was whether "back pay" which had been granted to an employee under the National Labor Relations Act should be treated as "wages" under the Social Security Act for the purpose

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*The fact that, out of supposed notions of "liberality" toward its client group, or otherwise, an agency might prefer a particular result at variance with the statute does not permit the statute to be ignored. See American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 318 (1964):

> "We are unable to find that any fair construction of the provisions relied on by the Board in this case can support its finding of an unfair labor practice. Indeed, the role assumed by the Board in this area is fundamentally inconsistent with the structure of the Act and the function of the sections relied upon. The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress."

of making credits to the Old Age and Survivors Insurance Account. The Social Security Board determined this question in the negative, and the Supreme Court reversed, holding that the agency determination had been "unsound." 327 U.S. 367. The argument that the court was bound by the "expert judgment" of the administrative agency was summarily rejected:

> "Administrative determinations must have a basis in law and must be within the granted authority. . . . An agency may not finally decide the limits of its statutory power. That is a judicial function. . . .
>
> "We conclude . . . that the Board's interpretation of this statute to exclude back pay goes beyond the boundaries of administrative routine and the statutory limits. This is a ruling which excludes from the ambit of the Social Security Act payments which we think were included by Congress. It is beyond the permissible limits of administrative interpretation." 327 U.S. at 369-70.

The preceding discussion has assumed, *arguendo,* that there was nothing more before the District Court than an erroneous administrative interpretation of the substantive provisions of the statute, and demonstrates that even under those circumstances the agency decision was subject to judicial review, and that the District Court should have determined, as it plainly failed to do, whether the statute was correctly interpreted and applied by appellees. But the matter of which appellants chiefly complain is not that appellees have simply made a mistake in their decision; it is, rather, that they have wholly ignored the mandatory procedural provisions of the statute setting forth the manner in which all Board decisions must be reached. The statute declares, in unmistakable terms, that the Board "is authorized and directed to make findings of fact with respect to any claim for benefits," including findings relating to question of disqualification of all individual applicants. Sections 5(b), 4(a-2). It is admitted that no individual findings were ever made (R. 91-92). It is also

painfully apparent that such findings were crucial to the eligibility of many, if not most, of the C(6) firemen. Even under appellees' construction of the statute, they were indispensable to the eligibility of those men who may have been offered other jobs as firemen (and therefore were disqualified under the Board's own regulations) (R. 226) and of those who quit their existing jobs before those jobs had been eliminated (and therefore necessarily "left work voluntarily") (R. 16).

This then, is the conclusive answer to the argument that appellees' conduct was shielded from judicial review by the doctrine of administrative discretion. Where, as here, public officials have acted in violation of the express command of the statute, there is no room for an argument that they have exercised their statutory discretion or that their actions are immune from judicial review. The cases all agree. See *Harmon v. Brucker,* 355 U.S. 579, 581-82 (1958):

> "In keeping with our duty to avoid deciding constitutional questions presented unless essential to proper disposition of a case, we look first to petitioners' nonconstitutional claim that respondent acted in excess of powers granted him by Congress. Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers. [Citations] The District Court had not only jurisdiction to determine its jurisdiction but also power to construe the statutes involved to determine whether the respondent did exceed his powers. If he did so, his actions would not constitute exercises of his administrative discretion, and, in such circumstances as those before us, judicial relief from this illegality would be available."

See also to the same effect, *NLRB v. Highland Park Co.,* 341 U.S. 322, 325-26 (1951); *Elmo Division of Drive-X Co. v. Dixon,* 348 F.2d 342, 344-45 (D.C. Cir. 1965).*

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*The decisions upon which the District Court relied (R. 143) are not to the contrary. In Adams v. Nagel, 303 U.S. 532 (1938), the Court

C. WHERE JUDICIAL REVIEW HAS NOT BEEN PROHIBITED BY CONGRESS, AND WHERE FEDERAL OFFICERS HAVE PROCEEDED IN VIOLATION OF STATUTE, A RIGHT OF JUDICIAL REVIEW UNQUESTIONABLY EXISTS.

The District Court concluded that the only provisions in the Act for judicial review of Board decisions were for appeals by employees of decisions denying their claims, and for appeals by the employers of decisions granting claims under circumstances where the employment relationship was denied (R. 143-44, 252). The court did not go further to decide whether the Act prohibits review under the circumstances here involved—the granting of claims where the employment relationship is not denied. This omission makes clear the District Court's confusion of two separate and distinct principles consistently recognized by the courts. It is one thing to find that Congress did not, in a particular statute, expressly provide for judicial review of particular action taken by the agency under that statute. *Cf. Stark v. Wickard,* 321 U.S. 288 (1944). It is wholly a different matter to conclude that Congress intended by the omission to prohibit all judicial review of such action. *Cf. Switchmen's Union v. National Mediation Bd.,* 320 U.S. 297 (1943). In failing to comprehend this distinction, the District Court failed to perceive the issue which it was called upon to decide.

The Supreme Court has held upon innumerable occasions that the courts of the United States have jurisdiction to review arbitrary agency action in all situations where review has not been pro-

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acknowledged that an officer would be restrained from acting in violation of his statutory authority (303 U.S. at 542). Udall v. Tallman, 380 U.S. 1 (1965), unlike the present case, involved a consistent interpretation by the agency of its own regulation, repeated over a period of years, acquiesced in by the Congress and relied upon to their detriment by numerous persons who had contracted with the United States; and even then, the administrative construction was accepted only because it was "quite clearly . . . reasonable" (380 U.S. at 4). Wilbur v. United States, 281 U.S. 206 (1930), was an action for mandamus and involved the question whether the relevant action was "ministerial" or "discretionary." Having determined that discretion was involved, the Court, *in an action for mandamus,* felt that it had reached the end of its inquiry.

hibited by Congress. See, *e.g., United States v. ICC,* 337 U.S. 426 (1949); *Stark v. Wickard,* 321 U.S. 288 (1944). No general prohibition of judicial review is contained in the Unemployment Insurance Act. The most that can be said is that the Act specifies a particular procedure for a review in selected and specific instances. Thus, in circumstances where an employee is denied a claim for benefits, and where an employer denies the fact of employment, the Act provides in section 5(c) for an administrative appeal, and in section 5(f) for judicial review by the Courts of Appeals. But no review proceedings, administrative or judicial, are either provided or prohibited with respect to a claim for unemployment benefits which has been granted.*

Section 5(c) also provides that in the two selected instances (where a claim for benefits is denied or the employment relationship is confirmed) the particular review procedure established in the Act is exclusive:

> "Any issue determinable pursuant to this subsection and subsection (f) of this section shall not be determined in any manner other than pursuant to this subsection and subsection (f)."

This proviso, however, obviously cannot have the effect of prohibiting judicial review of *other* decisions by the Board, as for example, a decision *granting* a claim for benefits. The proviso by its own terms includes only issues determinable under subsection (c) or subsection (f), and neither of these subsections has anything to do with a decision granting a claim for benefits where the employment relationship is not denied.

The fact that judicial review is expressly provided as to some matters neither compels nor suggests the conclusion that it is impliedly prohibited as to others. *Elmo Division of Drive-X Co. v. Dixon,* 348 F.2d 342, 344 (D.C. Cir. 1965), expressly so holds:

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*Except, of course, where the fact of employment is denied.

"The question we must resolve under A.F. of L. v. NLRB, supra, is thus whether Congress intended to foreclose District Court jurisdiction in the present case, given that its provision for Court of Appeals review does not per se preclude all District Court jurisdiction. Absent any clear directive in the statute itself or in the legislative history, it would seem necessary to decide this question on principle and by analogy to previous cases.

"So proceeding, we see no reason to bar District Court jurisdiction here, for relief in that court is appellant's only effective remedy, as we will demonstrate."

See also, to the same effect, *Fleming v. Moberly Milk Prods. Co.,* 160 F.2d 259 (D.C. Cir. 1947). Indeed, the present situation is much like that involved in *Stark v. Wickard,* 321 U.S. 288 (1944). There, as here, "the Act bears upon its face the intent to submit many questions arising under its administration to judicial review" and there, as here, "there is no direct judicial review granted by this statute for these proceedings." 321 U.S. at 307-08. The Court nevertheless found that jurisdiction existed to review matters not expressly dealt with by the review provisions of the statute:

"With this recognition by Congress of the applicability of judicial review in this field, it is not to be lightly assumed that the silence of the statute bars from the courts an otherwise justiciable issue . . . . Here, there is no forum, other than the ordinary courts, to hear this complaint. When, as we have previously concluded in this opinion, definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law, the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction." (321 U.S. at 309.)

Finally, subsection 5(g) of the Act provides:

"Findings of fact and conclusions of law of the Board in the determination of any claim for benefits or refund, the

> determination of any other matter pursuant to subsection (c) of this section, and the determination of the Board that the unexpended funds in the account are available for the payment of any claim for benefits or refund under this Act, shall be, except as provided in subsection (f) of this section, binding and conclusive for all purposes and upon all persons, including the Comptroller General and any other administrative or accounting officer, employee, or agent of the United States, and shall not be subject to review in any manner other than that set forth in subsection (f) of this section."

These provisions, however, cannot properly be construed to preclude judicial review of the granting by the Board of the claims for benefits of the C(6) firemen. For one thing, subsection (g) precludes review only of those matters to which subsections (c) and (f) relate:* namely, proceedings concerning the *denial* of claims for benefits and the *confirmation* of the fact of employment, while the issue in this action is the legality of the *granting* of claims for benefits where the employment relationship is not in issue. For another, subsection (g) declares to be binding and conclusive, with respect to claims, only the "findings of fact," "conclusions of law," and "determination[s]" of the Board. In the present case, however, it is the very absence of the statutory findings, conclusions, and determinations of which appellants complain, and the subsection, therefore, is expressly inapplicable.

Thus, as it turns out, the statute is wholly silent upon the matter of review of Board decisions of the sort now before this Court. Appellees' argument is therefore necessarily reduced to the proposition that, even though Congress has not spoken upon the subject, an intent to preclude judicial review of such decisions must nevertheless be implied. The argument, however, proves far too much. It assumes a prohibition of all judicial review, not only under circumstances where the Board has simply abused its dis-

*Except for the matter of the availability of unexpended funds for the payment of benefits, a question which, for present purposes, is immaterial.

cretion or where it has merely made a mistake, but also where, as here, the Board has ignored the command of the statute and has proceeded in excess of its statutory jurisdiction. As the Supreme Court has repeatedly held, an intent on the part of Congress to prohibit judicial review in such circumstances cannot and will not be assumed. See, *e.g.:*

United States v. ICC, 337 U.S. 426, 433-34 (1949):

"Under the contention the order is final and not reviewable by any court even though entered arbitrarily, without substantial supporting evidence, and in defiance of law.

"Such a sweeping contention for administrative finality is out of harmony with the general legislative pattern of administrative and judicial relationships. See, *e.g., Shields v. Utah I.C.R. Co.,* 305 U.S. 177, 181-85; *Stark v. Wickard,* 321 U.S. 288, 307-10. And this Court has consistently held Commission orders reviewable upon charges that the Commission had exceeded its lawful powers."

Stark v. Wickard, 321 U.S. 288, 309-10 (1944):

"When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction."

Leedom v. Kyne, 358 U.S. 184, 188 (1958):

"This case, in its posture before us, involves 'unlawful action of the Board [which] has inflicted an injury on the [respondent].' Does the law, 'apart from the review provisions of the . . . Act,' afford a remedy? We think the answer surely must be yes. This suit is not one to 'review,' in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike

> down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act."

For authority to the same effect see also *Harmon v. Brucker,* 355 U.S. 579, 581-82 (1958); *Parker v. Fleming,* 329 U.S. 531, 534-38 (1947); *Fleming v. Moberly Milk Prods. Co.,* 160 F.2d 259, 264-65 (D.C. Cir. 1947).* Indeed, the thrust of appellees' argument—that no court at any place or time or under any circumstances can compel them to obey the statute—would, if accepted, raise substantial problems under the Constitution of the United States; for those, like appellants, who bear the burdens of the Board's unlawful conduct would then have no opportunity whatever to be heard either by the Board or by the courts. Yet, as Justice Brandeis said in his concurring opinion in *St. Joseph Stock Yards Co. v. United States,* 298 U.S. 38, 77, 84 (1936), such is the very essence of due process:

> "[T]here must be the opportunity of presenting in an appropriate proceeding, at some time, to some court, every question of law raised, whatever the nature of the right invoked or the status of him who claims it.
>
> . . .
>
> "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous

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*Appellees argue (R. 215-16), and the District Court may have believed (R. 143-44), that the issue of judicial review of the Board's action under the circumstances of this case had been set to rest in Railway Express Agency v. Kennedy, 189 F.2d 801 (7th Cir. 1951), *cert. denied,* 342 U.S. 830 (1951). On the contrary, both the District Court and the Court of Appeals in *Kennedy* assumed, in considering the issue as presented there, that the Board had in fact performed its statutory duty to make findings with respect to eligibility for benefits. See the opinion of the District Court:

> "[The] statute requires the Board as such to make investigations, findings and determinations, as to the right of employees to receive unemployment compensation. When made, they are conclusive of the subject with right of appeal under the statute only on behalf of objecting employees." (95 F.Supp. at 788).

See also the opinion of the Court of Appeals at 189 F.2d 803. Since the Board failed to follow the statute with respect to the C(6) firemen, the *Kennedy* decisions are not in point.

rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly."

See also *Estep v. United States,* 377 U.S. 114 (1946); *Crowell v. Benson,* 285 U.S. 22 (1932); Jaffee, *Judicial Control of Administrative Action,* pp. 381-89 (Little, Brown & Co. 1965); *Cf. Stark v. Wickard,* 321 U.S. 288, 310 (1944); *Bodison Mfg. Co. v. California Employment Comm'n,* 17 C.2d 321, 109 P.2d 935 (1941).

There is no occasion to resolve such Constitutional questions here, for the decisions of the Supreme Court make it unmistakably clear that jurisdiction exists to review actions of the Board which are in excess of its statutory authority.

D. THE DOCTRINE OF SOVEREIGN IMMUNITY DOES NOT PRECLUDE JUDICIAL REVIEW OF ACTS OF THE BOARD IN EXCESS OF THE AUTHORITY CONFERRED BY ITS GOVERNING STATUTE.

Appellees contended repeatedly before the District Court that this action is an unconsented suit against the United States of which the courts have no jurisdiction (R. 76-77, 111-19, 210-12). Yet, appellees admit, as they must, that the doctrine of sovereign immunity does not bar actions to enjoin conduct "by officers beyond their statutory powers" (R. 113). This, however, is precisely such an action; for it is the refusal of appellees to comply with the mandatory procedural provisions of the statute and the payment by them of benefits in violation of that statute which appellants seek to enjoin. Obviously, therefore, there is nothing to the suggestion that the action is barred by the doctrine of sovereign immunity. The very cases upon which appellees rely (R. 111) so hold.* Indeed, this Court itself so held as recently as 1963. See *De Masters v. Arend,* 313 F.2d 79, 85 (9th Cir. 1963), where this Court collected the cases dealing with the doctrine of sovereign immunity and concluded:

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*See, *e.g.,* Land v. Dollar, 330 U.S. 731, 738 (1947); Larson v. Domestic & Foreign Corp., 337 U.S. 682, 701-04 (1959).

"However, if appellants were indeed prohibited by Section 7605(b) or the Fourth Amendment from initiating this inquiry, a suit to restrain their unlawful conduct would not be barred by sovereign immunity."

E. THE C(6) FIREMEN ARE CLEARLY NOT INDISPENSABLE PARTIES, WHERE AS HERE, THEIR ULTIMATE LEGAL INTERESTS WILL NOT BE AFFECTED AND THEY CANNOT IN ANY EVENT BE JOINED.

Appellees argued below (R. 126-27), and may contend here, that each of the thousands of C(6) firemen claiming unemployment benefits is an indispensable party and that, in the absence of any single one of these firemen, the action cannot proceed. Of course, if the action cannot proceed without each of the firemen, it cannot proceed at all, since the firemen are scattered through many States, and there is no procedure by which jurisdiction over all of them could be obtained.

According to traditional terminology, parties to a litigation are divided into four general categories: "improper" parties, "proper" parties, "necessary" parties, and "indispensable" parties. The distinction between the categories is based upon the relationship which the absent party has to the controversy. A party whose interest is so remote that he ought not to be in court is an improper party; a party who has a more immediate and extensive interest in the controversy will fall within one of the three latter categories, depending upon the extent of his interest. Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom,* 61 Colum. L. Rev. 1254 (1961). A party, therefore, is not indispensable merely because he possesses an interest in the controversy. It is not enough to argue, as appellees did in the District Court, that the C(6) firemen are indispensable parties *because* they may have an interest in the outcome of this litigation, for even if the argument were correct, it would establish only that these firemen would not be "improper" parties.

In *Shields v. Barrow,* 58 U.S. 130 (1854), the Supreme Court of the United States set out a definition of indispensable parties which has been followed ever since. Indispensable parties were defined as:

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." (58 U.S. at 139.)

According to this formulation, the indispensable party rule has a two-fold purpose: First, to protect the absent party from litigation which attempts to adjudicate his interest without his presence; and second, to protect the parties presently before the court from vexatious litigation when the relief afforded would otherwise be abortive and incomplete. Fink, *Indispensable Parties and the Proposed Amendment to Federal Rule 19,* 74 Yale L. J. 403, 405-06 (1965).

When these principles, as formulated by the Supreme Court in *Shields,* are applied to the litigation pending before this Court, it becomes apparent that the firemen are not indispensable parties. This litigation does not involve the adjudication of whether any single C(6) fireman is or is not qualified to receive unemployment benefits. To the contrary, the litigation will determine only whether the Board, in awarding such benefits, must comply with the statutory mandate that it make findings of fact regarding the claimant's qualifications for benefits. Nor is it necessary for the C(6) firemen to be present in order for this Court to render complete relief to the present parties consistent with "equity and good conscience." A judgment in appellants' favor would not preclude a single C(6) fireman from claiming unemployment benefits; nor would it deprive him of the right of judicial review of his claim. Such a judgment would require only that the Board comply with the statutory command that it determine, upon the basis of the facts of the particular case, whether the claimant is qualified for unemployment benefits. In connection with such a procedure, each of the firemen would be entitled to an initial determination as to his own qualifications for benefits. Each fireman dissatisfied

with that determination would have the statutory right to a hearing before a referee; to an appeal directly to the Board; and finally, to judicial review of the Board's decision in the Courts of Appeals. During all such administrative and judicial proceedings, each fireman would be free to make whatever assertions and to take whatever positions he might choose, excepting only the position that the Board is free to ignore the statutory requirements and to grant his claim without first finding that he is qualified to receive benefits.

Appellees' argument is thus reduced to the proposition that the absent C(6) firemen have an interest in securing unemployment benefits from the Board without compliance with the statutory requirement that the Board make findings to determine whether they are qualified, and that this interest has such dignity that each fireman is an indispensable party to this action. Merely to state the proposition is to refute it, for if it were true, then any party who is affected by the application of any statute would be an indispensable party to an action to determine the procedures provided by that statute. This Court recently held in *Reich v. Webb,* 336 F.2d 153 (9th Cir. 1964), *cert. denied,* 380 U.S. 915 (1965), that depositors and members of a savings and loan association had no right to intervene in a suit brought by the association against the Federal Home Loan Bank Board to enjoin the Board from conducting further administrative proceedings regarding certain transactions by the association. It was argued there, as it is here, that the absent parties had an interest in the litigation since "they might be adversely affected by a distribution or other disposition of property" of the association. 336 F.2d at 155. In denying the intervention, this Court impliedly concluded that despite this interest the absent parties were not indispensable to the action.

The Supreme Court of the United States has said that the question of "indispensability of parties is determined on practical considerations." *Shaughnessy v. Pedreiro.* 349 U.S. 48, 54 (1955). *Accord, Homestake Mining v. Mid-Continent Exploration Co.,*

282 F.2d 787, 797 (10th Cir. 1960). The fact that absent parties may have some technical and indirect interest in the outcome of the controversy is not sufficient to make them indispensable. This interest must be balanced against the desire that the parties before the court should be given some adjudication, rather than left without remedy, particularly where, as here, it is not possible to bring the absent parties before the court.

Indeed, the whole trend of the federal decisions has been to restrict the number of parties who are considered indispensable. Moreover, the recent amendment by the United States Supreme Court to Rule 19 of the Federal Rules of Civil Procedure emphasizes that the indispensable party doctrine is to be given a liberal view in accordance with equitable and discretionary factors. As amended, F.R.C.P. 19(b) provides:

> "If a person . . . cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent party being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."

It is clear, as previously demonstrated, that a judgment can be rendered granting complete relief to the present parties without legal prejudice to the rights of the absent firemen. However, if the firemen were held to be indispensable, no remedy could ever be granted to the present parties by any court. Such a result would clearly be contrary both to the Federal Rules and to established judicial decisions. As the Supreme Court of the United

States said in *Bourdieu v. Pacific Western Oil Co.*, 299 U.S. 65, 70-71 (1936):

> "The rule is that if the merits of the cause may be determined without prejudice to the rights of necessary parties, absent and beyond the jurisdiction of the court, it will be done; and a court of equity will strain hard to reach that result. [citing cases]
>
> We refer to the rule established by these authorities because it illustrates the diligence with which courts of equity will seek a way to adjudicate the merits of a case in the absence of interested parties that cannot be brought in."

Surely, having this admonition in mind, this Court should be reluctant to apply the policy of indispensability in such a fashion as to prevent any judicial determination whatever of the questions presently in issue.

III. Appellants Were and Are Entitled to the Declaratory and Injunctive Relief Sought by Them in the District Court.

A. APPELLANTS ARE ENTITLED TO A DECLARATION THAT THE PAYMENTS MADE TO THE C(6) FIREMEN WERE AND ARE UNAUTHORIZED BY THE STATUTE.

Appellants prayed below for a declaration (i) that the Board has proceeded in excess of its statutory jurisdiction in permitting the payment of unemployment benefits to the C(6) firemen without exploring the individual facts upon which eligibility for benefits necessarily rested, and (ii) that the Board, in the circumstances of this case, was and is under a mandatory duty to consider, upon the basis of the individual circumstances, which of the C(6) firemen claiming benefits were ineligible because they had "left work voluntarily" without "good cause" or had, by their refusal of the comparable jobs, "failed, without good cause, to accept suitable work" (R. 28-30).

Appellants believe that they have demonstrated that the Board failed entirely to perform its statutory duty to make findings

based upon the individual circumstances where those circumstances were crucial to the question of eligibility—and that this conclusion necessarily follows even if appellees' rather remarkable interpretations of the meaning of the statute were to be accepted. Appellants have also shown that appellees' interpretations of the words "work" and "good cause" as used in the statute—the interpretations upon which their whole position is based—are wholly at odds with the meaning and purpose of the Act, and must, therefore, be rejected. Appellants therefore were and are entitled to the declaratory relief sought by them in the District Court. Since, however, each of the foregoing matters is entirely clear from the record, this Court need not remand the case to the District Court for the making of findings and conclusions consistent with its decision, but may itself grant appellants the declaratory relief prayed for in the complaint. 28 U.S.C. § 2106 (1964); *Smith v. Dravo Corp.,* 208 F.2d 388, 391-92 (9th Cir. 1953). It will then remain for the Board, in the light of this Court's decision, to consider, upon the basis of the individual circumstances, the eligibility of all C(6) firemen making application for benefits.

There is only one possible situation in which further proceedings in the District Court might be considered appropriate—that situation which would be presented if this Court concluded that appellees' present interpretation of the statute might be entitled to some weight if that interpretation had in fact been made by the Board in a considered exercise of its discretion. In that event, the case might be remanded for a trial on the merits of the disputed issues of fact relating to what the Board did and the reasons it gave for its actions. In appellants' view of the case, however, there is, under the principles applicable to judicial review of administrative action, no occasion for such a determination; for if, as seems clear, appellees' interpretation of the statute is incorrect, it would acquire no additional lustre even if it had been that of the Board. See the authorities cited and discussed in part II B, *supra.*

B. APPELLANTS ARE ENTITLED TO PRELIMINARY AND PERMANENT INJUNCTIONS FORBIDDING THE PAYMENT OF FURTHER UNEMPLOYMENT BENEFITS TO THE C(6) FIREMEN UNTIL SUCH TIME AS THE BOARD COMPLIES WITH THE STATUTORY COMMAND THAT IT MAKE FINDINGS UPON THE MATTER OF ELIGIBILITY.

Appellants' initial motion for a preliminary injunction was made on October 25, 1965. The motion was denied by the District Court on November 23 on the grounds that the Board had acted within its discretion and that appellants had no standing to sue (R. 143-45).* At the time the District Court declined to preserve the status quo pending the litigation, unemployment benefits were being paid out to the C(6) firemen at a rate of approximately $20,000 to $25,000 each week (R. 21, 227-28).

Believing that the District Court was in error, appellants renewed their motion for a preliminary injunction, presenting additional materials intended to show that the Board had not in fact exercised any discretion, statutory or otherwise, and that appellants in fact had a justiciable interest in the unlawful waste of the Account (R. 188-201, 203-07). There is no doubt that such a procedure was proper. See *Red Star Yeast & Prods. Co. v. La Budde,* 83 F.2d 394 (7th Cir. 1936); Nichols, *Cyclopedia of Federal Procedure,* Section 73.49 (3d ed. 1965). The renewed motion for a preliminary injunction was submitted for decision on April 22, 1966. As of that date, unemployment benefits were then being paid out in the approximate amount of $12,750 each week (R. 228). The District Court did not rule upon the renewed motion for preliminary relief until after a period of more than eleven weeks had gone by (R. 262)—and until, by extrapolation, an additional $140,250 would have been paid out. The injunction

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*The court also ultimately found that the issuance of a preliminary injunction would "adversely" affect the interests of the public and the C(6) firemen (R. 251). The word "adversely" is that of appellees, having been inserted by them in their proposed findings, though it was not used by the court in either of its memorandum decisions. The finding must, in any event, be disregarded, since it is wholly unsupported by the record.

was then denied, without further discussion, "for the reasons set forth" in the court's earlier memorandum (R. 233-34).

It seems quite clear that, under the applicable authorities, appellants were entitled to the preliminary injunctive relief which was denied them by the District Court. The decision of the Supreme Court of the United States in *Ohio Oil v. Conway,* 279 U.S. 813 (1929), is closely in point. See also *Burton v. Matanuska Valley Lines, Inc.,* 244 F.2d 647, 650-51 (9th Cir. 1957), where this Court restated and reiterated the rule of the *Conway* decision.

The District Court did not dispute the fact that many thousands of dollars would be paid out to the C(6) firemen before the controversy could be resolved upon its merits. On the contrary, the court found that "the Board has paid out and will pay out substantial sums of money from the Railroad Unemployment Insurance Account pursuant to the above administrative ruling." (R. 251) The District Court nevertheless denied the applications for preliminary relief upon the theory that appellants would be unlikely to prevail upon the merits with respect to the questions of administrative discretion and standing (R. 143-44). In this conclusion, the court not only erred upon the merits, as has already been shown; it also failed to give due consideration to the rule of this Circuit that the court must entertain a motion for preliminary relief if there is a "possibility that the plaintiff may make out a case upon the merits." *Ross-Whitney Corp. v. Smith Kline & French Labs.*, 207 F.2d 190, 194 (9th Cir. 1953). The fact that some of the issues presented on the merits might involve jurisdictional questions, does not, of course, alter the rule. *American Fed'n of Musicians v. Stein,* 213 F.2d 679, 683 (6th Cir. 1964).

The orders denying a preliminary injunction were therefore in error, and should be reversed by this Court.* The case should be remanded with directions that the District Court enter a permanent injunction forbidding the payment of any further benefits to the C(6) firemen unless and until the Board complies with the provisions of the statute requiring it to make factual determinations concerning the matter of eligibility. In the alternative, and if this Court concludes that further proceedings in the District Court would be desirable, this Court's mandate should include directions that the District Court issue its order forbidding any further payments to the C(6) firemen until the final determination of such proceedings and of any appeals which may follow from them.

CONCLUSION

The necessary implication of appellees' arguments, as well as of the decisions of the District Court, is that neither this nor any other court has power to review the conduct of the Board, no matter how unlawful or improper that conduct might be and without regard to whether the Board has elected to ignore any or all of the provisions of the statute creating its power to act. Appellants respectfully submit that the judicial decisions invoked in support of this remarkable thesis will not bear such a burden; and that this Court clearly has the power to restrain appellees' unlawful actions and thereby ensure the integrity of the Account.

The judgments below should, therefore, be reversed; appellants should be awarded the declaratory relief prayed for by them in the complaint; and the District Court should be directed to enter

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*It will not do to argue that the denial of preliminary relief, in the circumstances presented here, constituted an exercise of the "discretion" of the District Court and is therefore subject only to limited review. Because of its conclusion that appellants had no standing to sue and that the conduct of the Board was shielded by the doctrine of administrative discretion, it seems plain that the District Court failed to exercise the discretion possessed by it under the law.

its permanent injunction forbidding further payment of unemployment benefits to the C(6) firemen, unless and until the Board complies with the command of the statute that it make findings of fact relating to eligibility.

Dated: San Francisco, California, November 30, 1966.

Respectfully submitted,

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Of Counsel

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

BURNHAM ENERSEN

(Appendices Follow)

Appendix A

Paragraph C(6) of the Arbitration Award.

C(6). All other firemen (helpers) with less than 10 years' seniority on the effective date of this Award shall retain their rights to and obligations to protect engine service assignments as provided by rules in effect on the day preceding the day this Award becomes effective, except as modified by and subject to the provisions of Part D of this Award, unless and until offered by the carrier another comparable job (such as, but not limited to, engineer, fireman (helper), brakeman, or clerk in the same or another seniority district) for which they are, or can become, qualified. The offer of another job shall carry with it relocation expenses as provided for and under the conditions set forth in Section 10 of the Washington Job Protection Agreement of May 21, 1936, the continuation of accumulated seniority rights toward such purposes as vacation and other applicable fringe benefits, and guaranteed annual earnings, for a period not exceeding 5 years, equal to the total compensation received by each such employee as fireman (helper), hostler helper, hostler, or engineer during the last 12 months in which compensation was received prior to the date of transfer. Such offers of jobs shall be posted and made available to all qualified firemen (helpers) in order of seniority in the seniority district in which the job offered is located. If, within 7 days after notice is posted, no senior man elects to take such offered job, the most junior man then on the fireman (helper) roster in that seniority district must, within 3 days from receipt of written notice, accept the job or all of his employment and seniority rights and relations shall be terminated and, in that event, he shall be entitled to one-half the severance allowance provided for in paragraph C(3) of this Award. If such junior fireman (helper) shall fail to accept such job and thereby terminates his employment as herein provided,

the next most junior fireman (helper) on that same roster must accept the job within 3 days from receipt of written notice or forfeit all of his employment and seniority rights and relations with the allowance provided for above. In each case of refusal to accept such job offer the next most junior fireman (helper) shall be required to accept, as provided for above, or forfeit his employment and seniority rights and relations with, in each case, the allowance provided for above, until there are no firemen (helpers) with less than 10 years' seniority remaining on the seniority roster for the seniority district in which the job offer is located. Thereafter, the same procedure as is provided above shall be followed in the fireman (helper) seniority district which has its principal extra list for firemen (helpers) closest to the location of the job offered.

Appendix B

Selected Provisions of the Railroad Unemployment Insurance Act.

SECTION 1(k)

(k) Subject to the provisions of section 4 of this Act, (1) a day of unemployment, with respect to any employee, means a calendar day on which he is able to work and is available for work and with respect to which (i) no remuneration is payable or accrues to him, and (ii) he has, in accordance with such regulations as the Board may prescribe, registered at an employment office; . . . .

SECTION 4

DISQUALIFYING CONDITIONS

SEC. 4. (a-1) There shall not be considered as a day of unemployment or as a day of sickness, with respect to any employee—

(i) any of the seventy-five days beginning with the first day of any registration period with respect to which the Board finds that he knowingly made or aided in making or caused to be made any false or fraudulent statement or claim for the purpose of causing benefits to be paid;

(ii) any day in any period with respect to which the Board finds that he is receiving or will have received annuity payments or pensions under the Railroad Retirement Act of 1935 or the Railroad Retirement Act of 1937, or insurance benefits under title II of the Social Security Act, or unemployment, maternity, or sickness benefits under an unemployment, maternity, or sickness compensation law other than this Act, or any other social insurance payments under any law: *Provided,* That if an employee receives or is held entitled to receive any such payments, other than unemployment, maternity, or sickness payments, with respect to any period which include days of unemployment or sickness in a registration period, after benefits under this Act for such

registration period will have been paid, the amount by which such benefits under this Act will have been increased by including such days as days of unemployment or as days of sickness shall be recoverable by the Board: *Provided further,* That, if that part of any such payment or payments, other than unemployment, maternity, or sickness payments, which is apportionable to such days of unemployment or days of sickness is less in amount than the benefits under this Act which, but for this paragraph, would be payable and not recoverable with respect to such days of unemployment or days of sickness, the preceding provisions of this paragraph shall not apply but such benefits under this Act for such days of unemployment or days of sickness shall be diminished or recoverable in the amount of such part of such other payment or payments;

(a-2) There shall not be considered as a day of unemployment, with respect to any employee—

(i) (A) subject to the provisions of subdivision (B) hereof, any of the days in the period beginning with the day with respect to which the Board finds that he left work voluntarily, and continuing until he has been paid compensation of not less than $750 with respect to time after the beginning of such period;

(B) if the Board finds that he left work voluntarily with good cause, the provisions of subdivision (A) shall not apply, with respect to him, to any day in a registration period if such period does not include any day which is in a period for which he could receive benefits under an unemployment compensation law other than this Act, and he so certifies. Such certification shall, in the absence of evidence to the contrary, be accepted subject to the penalty provisions of section 9(a) of this Act;

(ii) any of the thirty days beginning with the day with respect to which the Board finds that he failed, without good cause, to accept suitable work available on such day and offered to him, or to comply with instructions from the Board requiring him to apply for suitable work or to report, in

person or by mail as the Board may require, to an employment office;

(iii) subject to the provisions of subsection (b) of this section, any day with respect to which the Board finds that his unemployment was due to a stoppage of work because of a strike in the establishment, premises, or enterprise at which he was last employed, and the Board finds that such strike was commenced in violation of the provisions of the Railway Labor Act or in violation of the established rules and practices of a bona fide labor organization of which he was a member.

(b) The disqualification provided in section 4 (a-2) (iii) of this Act shall not apply if the Board finds that—

(i) the employee is not participating in or financing or directly interested in the strike which causes the stoppage of work: *Provided,* That payment of regular union dues shall not be construed to constitute financing a strike or direct interest in a strike within the meaning of this and the following paragraphs; and

(ii) he does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed in the establishment, premises, or enterprise at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute: *Provided,* That if separate types of work are commonly conducted in separate departments of a single enterprise, each such department shall, for the purposes of this subsection, be deemed to be a separate establishment, enterprise, or other premises.

(c) No work shall be deemed suitable for the purposes of section 4(a-2) (ii) of this Act, and benefits shall not be denied under this Act to any otherwise qualified employee for refusing to accept work if—

(i) the position offered is vacant due directly to a strike, lockout, or other labor dispute;

(ii) the remuneration, hours, or other conditions of work offered are substantially less favorable to the employee than those prevailing for similar work in the locality, or the rate of remuneration is less than the union wage rate, if any, for similar work in the locality;

(iii) as a condition of being employed he would be required to join a company union or to resign from or refrain from joining any bona fide labor organization;

(iv) acceptance of the work would require him to engage in activities in violation of law or which, by reason of their being in violation of reasonable requirements of the constitution, by-laws, or similar regulations of a bona fide labor organization of which he is a member, would subject him to expulsion from such labor organization; or

(v) acceptance of the work would subject him to loss of substantial seniority rights under any collective bargaining agreement between a railway labor organization, organized in accordance with the provisions of the Railway Labor Act, and any other employer.

(d) In determining, within the limitations of section 4(c) of this Act, whether or not any work is suitable for an employee for the purposes of section 4(a-2)(ii) of this Act, the Board shall consider, in addition to such other factors as it deems relevant, (i) the current practices recognized by management and labor with respect to such work; (ii) the degree of risk involved to such employee's health, safety, and morals; (iii) his physical fitness and prior training; (iv) his experience and prior earnings; (v) his length of unemployment and prospects for securing work in his customary occupation; and (vi) the distance of the available work from his residence and from his most recent work.

(e) For the purposes of section 4(a-2)(i) of this Act, no voluntary leaving of work shall be deemed to have been without good cause if the Board finds that such work would not have been suitable for the purposes of section 4(a-2)(ii) of this Act.

SECTION 5

CLAIMS FOR BENEFITS

SEC. 5. (a) Claims for benefits and appeals from determinations with respect thereto shall be made in accordance with such regulations as the Board shall prescribe. Each employer shall post and maintain, in places readily accessible to employees in his service, such printed statements concerning such regulations as the Board supplies to him for such purpose, and shall keep available to his employees copies of such printed statements. Such printed statements shall be supplied by the Board to each employer without cost to him.

(b) The Board is authorized and directed to make findings of fact with respect to any claim for benefits and to make decisions as to the right of any claimant to benefits. The Board is further authorized to hold such hearings, to conduct such investigations and other proceedings, and to establish, by regulations or otherwise, such procedures as it may deem necessary or proper for the determination of a right to benefits.

(c) Each qualified employee whose claim for benefits has been denied in whole or in part upon an initial determination with respect thereto upon a basis other than one which is reviewable pursuant to one of the succeeding paragraphs of this subsection shall be granted an opportunity for a fair hearing thereon before a referee or such other reviewing body as the Board may establish or assign thereto.

Any claimant whose claim for benefits has been denied in an initial determination with respect thereto upon the basis of his not being a qualified employee, and any claimant who contends that under an initial determination of his claim he has been awarded the benefits at less than the proper rate, may appeal to the Board for the review of such determination. Thereupon the Board shall review the determination and for such review may designate one of its officers or employees to receive evidence and

to report to the Board thereon together with recommendations. In any such case the Board or the person so designated shall, by publication or otherwise, notify all parties properly interested of their right to participate in the proceeding and, if a hearing is to be held, of the time and place of the hearing. At the request of any party properly interested the Board shall provide for a hearing, and may provide for a hearing on its own motion. The Board shall prescribe regulations governing the appeals provided for in this paragraph and for decisions upon such appeal.

In any case in which benefits are awarded to a claimant in whole or in part upon the basis of pay earned in the service of a person or company found by the Board to be an employer as defined in this Act but which denies that it is such an employer, such benefits awarded on such basis shall be paid to such claimant subject to a right of recovery of such benefits. The Board shall thereupon designate one of its officers or employees to receive evidence and to report to the Board on whether such benefits should be repaid. The Board may also designate one of its officers or employees to receive evidence and report to the Board whether or not any person or company is entitled to a refund of contributions or should be required to pay contributions under this Act, regardless of whether or not any claims for benefits will have been filed upon the basis of service in the employ of such person or company, and shall follow such procedure if contributions are assessed and payment is refused or payment is made and a refund claimed upon the basis that such person or company is or will not have been liable for such contributions. In any such case the Board or the person so designated shall, by publication or otherwise, notify all parties properly interested of their right to participate in the proceedings and, if a hearing is to be held, of the time and place of the hearing. At the request of any party properly interested the Board shall provide for a hearing, and may provide for a hearing on its own motion. The Board shall prescribe regulations govern-

ing the proceedings provided for in this paragraph and for decisions upon such proceedings.

Final decision of the Board in the cases provided for in the preceding two paragraphs shall be communicated to the claimant and to the other interested parties within fifteen days after it is made. Any properly interested party notified, as hereinabove provided, of his right to participate in the proceedings may obtain a review of any such decision by which he claims to be aggrieved or the determination of any issue therein in the manner provided in subsection (f) of this section with respect to the review of the Board's decisions upon claims for benefits and subject to all provisions of law applicable to the review of such decisions. Subject only to such review, the decision of the Board upon all issues determined in such decision shall be final and conclusive for all purposes and shall conclusively establish all rights and obligations, arising under this Act, of every party notified as hereinabove provided of his right to participate in the proceedings.

Any issue determinable pursuant to this subsection and subsection (f) of this section shall not be determined in any manner other than pursuant to this subsection and subsection (f).

(d) The Board shall prescribe regulations governing the filing of cases with and the decision of cases by reviewing bodies, and the review of such decisions. The Board may provide for intermediate reviews of such decisions by such bodies as the Board may establish or assign thereto. The Board may (i) on its own motion review a decision of an intermediate reviewing body on the basis of the evidence previously submitted in such case, and may direct the taking of additional evidence, or (ii) permit such parties as it finds properly interested in the proceedings to take appeals to the Board. Unless a review or an appeal is had pursuant to this subsection, the decision of an intermediate reviewing body shall, subject to such regulations as the Board may prescribe, be deemed to be the final decision of the Board.

(e) In any proceeding other than a court proceedings, the rules of evidence prevailing in courts of law or equity shall not be controlling, but a full and complete record shall be kept of all proceedings and testimony, and the Board's final determination, together with its findings of fact and conclusions of law in connection therewith, shall be communicated to the parties within fifteen days after the date of such final determinations.

(f) Any claimant, or any railway labor organization organized in accordance with the provisions of the Railway Labor Act, of which claimant is a member, or any other party aggrieved by a final decision under subsection (c) of this section, may, only after all administrative remedies within the Board will have been availed of and exhausted, obtain a review of any final decision of the Board by filing a petition for review within ninety days after the mailing of notice of such decision to the claimant or other party, or within such further time as the Board may allow, in the United States court of appeals for the circuit in which the claimant or other party resides or will have had his principal place of business or principal executive office, or in the United States Court of Appeals for the Seventh Circuit or in the United States Court of Appeals for the District of Columbia. A copy of such petition, together with initial process, shall forthwith be served upon the Board or any officer designated by it for such purpose. Service may be made upon the Board by registered mail addressed to the Chairman. Within fifteen days after receipt of service, or within such additional time as the court may allow, the Board shall file with the court in which such petition has been filed the record upon which the findings and decision complained of are based, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition the court shall have exclusive jurisdiction of the proceeding and of the question determined therein, and shall give precedence in the adjudication thereof over all other civil cases not otherwise

entitled by a law to precedence. It shall have power to enter a decree affirming, modifying, or reversing the decision of the Board, with or without remanding the cause for rehearing. The findings of the Board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive. No additional evidence shall be received by the court, but the court may order additional evidence to be taken before the Board, and the Board may, after hearing such additional evidence, modify its findings of fact and conclusions and file such additional or modified findings and conclusions with the court, and the Board shall file with the court the additional record. The judgment and decree of the court shall be final, subject to review as in equity cases.

An applicant for review of a final decision of the Board concerning a claim for benefits shall not be liable for costs, including costs of service, or costs of printing records, except that costs may be assessed by the court against such applicant if the court determines that the proceedings for such review have been instituted or continued without reasonable ground.

(g) Findings of fact and conclusions of law of the Board in the determination of any claim for benefits or refund, the determination of any other matter pursuant to subsection (c) of this section, and the determination of the Board that the unexpended funds in the account are available for the payment of any claim for benefits or refund under this Act, shall be, except as provided in subsection (f) of this section, binding and conclusive for all purposes and upon all persons, including the Comptroller General and any other administrative or accounting officer, employee, or agent of the United States, and shall not be subject to review in any manner other than that set forth in subsection (f) of this section.

(h) Except as may be otherwise prescribed by regulations of the Board, benefits payable with respect to any period prior to

the date of a final decision of the Board with respect to a claim therefor, shall be paid only after such final decision.

(i) No claimant or other properly interested person claiming benefits shall be charged fees of any kind by the Board, its employees or representatives, with respect to such claim. Any such claimant or other properly interested person may be represented by counsel or other duly authorized agent, in any proceeding before the Board or its representatives or a court, but no such counsel or agent for a claimant shall either charge or receive for such services more than an amount approved by the Board or by the court before whom the proceedings of the Board are reviewed. Any person who violates any provision of this subsection shall be punished by a fine of not more than $10,000 or by imprisonment not exceeding one year.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 20785 and 21377

THE WESTERN PACIFIC RAILROAD COMPANY and the SOUTHERN PACIFIC COMPANY, suing on their own behalf and on behalf of all other railroads similarly situated,

Appellants

v.

HOWARD W. HABERMEYER, THOMAS M. HEALY, and A. E. LYON, individually and as members of the Railroad Retirement Board, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

APPELLEES' REPLY BRIEF

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APPELLEES' REPLY BRIEF

STATEMENT OF THE CASE

The basic facts have been reported in the Appellants' Opening Brief, pages 2-8, and need not be repeated here. Any differences appellees may have will be referenced in the argument.

THE ISSUES

There are several threshold questions which must be resolved:

1. Is this action precluded by the Railroad Unemployment Insurance Act?
2. Do the appellants have standing to sue?
3. Has the United States consented to suit by the appellants?
4. Are all indispensable parties before the Court?

If each and all of the above issues are resolved in favor of appellants the issue will be whether the Board's procedures and determinations violated a statute or were arbitrary and capricious

SUMMARY OF APPELLEES' ARGUMENT

1. The statute in question specifically sets forth those matters which are to be the subject of court review, and provides that there will be no review as to all other matters. Denial of claims by the employee can be reviewed only at the instance of the employee. There is no provision allowing an employer to secure review of the allowance of an employee's claim. Indeed, the employer can only contest (a) the status of employment -- where the employer contends that the claimant is not an employee, and (b) the question as to whether contributions by or refunds to the employer are due. Significantly the Act provides that even where employment status is contested by the employer the claimant shall be paid insurance benefits, subject to possible later recovery by the Board.

2. The appellants are Federal taxpayers who contribute to a fund created for the protection of unemployed railroad workers. This fund is owned, controlled and managed by the Federal Government. The appellants have no standing to attack the manner in which the Federal Government manages its funds.

3. The United States has not consented to be sued in proceedings such as those before this Court. The actions taken by the officials under attack were within their statutory authority. The courts will not review discretionary decisions of executive agencies, particularly where these decisions relate to the expenditure of Government funds.

4. The appellants have made no effort to bring even one of the "C(6)" firemen receiving compensation before this Court. Since a judgment adverse to appellees would stop the payment of unemployment compensation to the "C(6)" recipients, these men are indispensable parties.

5. The Board's determinations were not arbitrary or capricious, but were in accord with the Act.

a. Neither the Arbitration Award nor the Act preclude C(6) firemen from receiving unemployment compensation by reason of their acceptance of severance pay. The severance pay was not intended as a substitute for unemployment compensation.

b. The Board was not under any statutory or other requirement to make individual findings with respect to each

fireman applicant. Under standard Board procedures when classes of persons are involved, a class decision is made, and payments follow this decision. In the present instance the decision that refusal of "comparable" employment and the acceptance of severance pay was neither a voluntary leaving of work, nor a refusal to accept suitable work without just cause had a rational basis, was within the statutory authority of the Board, and should not be reversed by the Court.

ARGUMENT

I

THE RAILROAD UNEMPLOYMENT INSURANCE ACT PRECLUDES SUIT BY AN EMPLOYER TO ENJOIN THE PAYMENT OF UNEMPLOYMENT BENEFITS TO ITS EMPLOYEES

The appellees treat this proposition first because in appellees' opinion it presents no genuine issue. Furthermore, if the Court should decide, as we believe it must, that the Act precludes any attack by the carriers upon unemployment insurance awards the Court need not reach any of the other points.

The pertinent provisions of the Act are set forth in Appendix B to Appellants' Opening Brief, and need not be repeated here in full. However, the following portions of the Act are relevant to the above proposition.

Section 5(c) of the Act provides that

> "Subject only to such review [the review provided for by subsection (f) of this section], the decision of the Board upon all issues determined in such decision shall be final and conclusive for

> all purposes and shall conclusively establish all rights and obligations, arising under this chapter, of every party notified as hereinabove provided of his right to participate in the proceedings.
>
> "Any issue determinable pursuant to this subsection and subsection (f) of this section shall not be determined in any manner other than pursuant to this subsection and subsection (f) of this section."

Section 5(f) provides for judicial review by an appropriate U. S. Court of Appeals only of decisions of the Board (1) denying claims in whole or in part, on the petition of the claimant or of the labor organization of which claimant is a member, and (2) granting claims where the Board has found claimant to be an employee of an employer which denies such relationship.

Subsection (g) of the Act provides that:

> "findings of fact and conclusions of law of the Board in the determination of any claim for benefits or refund, the determination of any other matter pursuant to Subsection (c) of this Section, and the determination of the Board that the unexpended funds in the account are available for the payment of claim for benefit or refund under this Act, shall be, except as provided in Subsection (f) of this Section, binding and conclusive for all purposes and upon all persons, including the Comptroller General and any other administrative or accounting officer, employee, or agent of the United States and shall not be subject to review in any manner other than that set forth in Subsection (f) of this section."

In short, under the Act, Court review is limited to a denial of claims at the instance of the claimant, a denial of the status of employment at the instance of the employer and a denial of contributions due, or contention of refund due, at the instance

of the employer. Otherwise the findings of fact and conclusions of law of the Board are made final and conclusive. By this language Congress carved out and limited the areas as to which the employers were deemed to have a legitimate interest.

Here the Board's action in determining that C(6) firemen would not be disqualified under Sections 4(a-2)(i) and 4(a-2)(ii) from receiving benefits does not fall within the review provision of Section 5(f) of the Act; thus, this action of the Board is not subject to judicial review. For the Act, as shown above, provides that:

> "findings of fact and conclusions of law of the Board in the determination of any claim for benefits . . . shall be, except as provided in subsection (f) of this section, binding and conclusive for all purposes and upon all persons and . . . shall not be subject to review in any manner other than set forth in subsection (f) [of the Act]."

The Court of Appeals for the Seventh Circuit has held, quoting the above excerpt from subsection (g) of the Act, that:

> "A careful consideration of all of these sections of the Act convinces us that Congress intended to grant a judicial review of the decisions of the Board on claims for compensation where the employee status was not denied by the carrier, only to employees whose claims to compensation have been disallowed in whole or in part." (Emphasis added) Railway Express Agency v. Kennedy, 189 F. 2d 801, 804 (1951), cert. denied 342 U.S. 830 (1951).

The Railway Express Agency case, as this Court will note, involved a similar attack upon payments of claims by the Railroad

Retirement Board, and is, in fact, the only case directly in point. It is also worthy of note that in almost thirty years of administration there was only one attempt by an employer, other than the case at bar, to contest benefit payments, and that attempt ended in failure. We would suppose that if the District Court had jurisdiction of such actions, and if the Board was diverting and wasting funds as charged by appellants (Brief, pp. 35-36) there would have been more than two restraining actions filed in such a long period.

Appellants concede that subsection (f) does not provide a basis for this action (Brief, pp. 50-56); however, appellants seek to avoid the clear prohibition of subsection (g) and the holding by the Court of Appeals for the Seventh Circuit as follows: First, appellants argue that "subsection (g) precludes review only of those matters to which subsection (c) and (f) relate. . ." (Brief, p. 53). There is absolutely nothing in subsection (g) to support appellants' argument. Subsection (g) applies to <u>all</u> findings of fact and conclusions of law of the Board in the determination of any claim for benefits, which would include determinations granting as well as denying such claims. Congress obviously intended to include determinations granting claims since the finality provision applies specifically to the Comptroller General who would be primarily interested in claims which were granted.

Second, appellants argue that the instant case differs from the case before the Seventh Circuit Court of Appeals since here appellees have made a general finding applicable to the eligibility of C(6) firemen under Sections 4(a-2)(i), (ii) of the Act. (Brief, pp. 43, 55.) To the contrary, the case before the Court of Appeals for the Seventh Circuit involved a general finding also made initially by Mr. H. L. Carter, the Director of Employment and Claims (now called the Director of Unemployment and Sickness Insurance), that Railway Express Agency's New York employees were not disqualified for unemployment benefits under Section 4(a-2)(iii) of the Act. (Record, pp. 36-37.) The record in the Kennedy case also reveals that the procedure followed by the Board in determining the eligibility of that group of claimants for benefits was the same procedure that is before this Court.

The legislative history of the Act confirms that Congress intended to prohibit the maintenance of this action. When the original bill was under consideration by Congress spokesmen for the railroads complained "there is no appeal provided anywhere in this bill for the railroads which pay the freight." (Hearings before the Subcommittee of the House Committee on Interstate and Foreign Commerce, 75th Cong., 3rd Sess. on H.R. 10127, p. 214, and Hearings before the Senate Committee on Interstate Commerce, 75th Cong., 3rd Sess. on S. 3722, p. 124.) Nevertheless, Congress did not change the provisions.

In 1945 a number of amendments to the Act and to the Railroad Retirement Act were being considered, including an amendment to

provide judicial review initially in the Circuit Court of Appeals, instead of in the District Courts as had been the case theretofore. And it appears from the colloquy between Congressman O'Hara and the Union representative, Mr. Schoene, that it was clearly understood that the employers would not have an appealable interest with respect to the question of whether or not an individual claimant was entitled to unemployment insurance. See Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 1362, 79th Cong., 1st Sess., p. 1091 (R. 108-109).

It should also be noted that the Act in addition to precluding the maintenance of this suit, prescribes a specific method of review where review is available. That limited review of Board actions must be in an appropriate Court of Appeals. Yet, appellants would circumvent this provision by seeking review in a Federal District Court. Where Congress has provided a particular method of judicial review that method must be followed. Cf. Switchmen's Union v. National Mediation Board, 320 U.S. 297 (1943); Whitney National Bank v. New Orleans Bank, 379 U.S. 411, 422 (1965). An action brought outside of the prescribed statutory procedure must be dismissed. See City of Tacoma v. Taxpayers, 357 U.S. 320, 336 (1957).

Appellees respectfully submit that this Court need and should look no further than subsections (c), (f) and (g) of Section 5 of the Act to affirm the District Court decision in this case.

II

APPELLANTS ARE WITHOUT STANDING TO SUE

Under the Railroad Unemployment Insurance Act, 45 U.S.C. 351, et seq., contributions to the fund are fixed by Congress on the basis of certain percentages set forth in Section 358. At the present time the employers are required to pay into the fund 4% of total compensation paid to all employees during the calendar year. This fund is deposited in the Treasury in an account known as the Railroad Unemployment Insurance Account. The moneys in the account are used exclusively for the payment of the benefits and refunds provided for in the Act (Section 360). Payment from the fund is controlled by the Railroad Retirement Board. There is no provision for any interest in, or control of, the fund on the part of the employers. The fund is not administered by the employers but entirely by the Federal Government. The fund is not the property of the appellants and they have no voice in its disposition.

The present rate of payment, as stated, is 4% and will remain at 4% until the insurance fund exceeds $300 million or until Congress changes the law. The fund is in the red by approximately $270 million (R. 84). Thus, before the appellants' rate can be reduced the fund must accumulate $590 million. Since at the present time the expected excess of income over outgo is about $17 million a year, it will be many many years before the appellant can suffer any conceivable injury (R. 86).

With these facts in mind it is the appellees' contention that the appellants have not shown any standing. The principle is set forth in Associated Industries v. Ickes, 134 F. 2d 694, 700, 701, cert. granted 319 U.S. 739, vacated as moot 320 U.S. 707 (1943) where the Court stated:

> "Unless, then, the citizen first shows that some substantive private legally protected interest possessed by him has been invaded or is threatened with invasion by the defendant officer thus regarded as a private person, the suit must fail for want of a justiciable controversy, it being then merely a request for a forbidden advisory opinion. That the plaintiff shows financial loss on his part resulting from unlawful official conduct is not alone sufficient, for such a loss, absent any such invasion of the plaintiff's private substantive legally protected interest, is damnum absque injuria."

This doctrine has not only been followed in the cases involving injury to the competitive position of certain plaintiffs such as in Alabama Power Co. v. Ickes, 302 U.S. 464 (1938) but in a variet of other cases where the Court has been unable to discover any private substantive legally protected interest which has been invaded by the Government. See e.g., Taft Hotel Corp. v. Housing and Home Finance Agency, 262 F. 2d 307 (C.A. 2, 1958), cert. denied 359 U.S. 967; Duba v. Schuetzle, 303 F. 2d 570, 574-575 (C.A. 8, 1962); Harrison-Halsted Com. Group v. Housing and Home Finance Agency, 310 F. 2d 99, 104 (C.A. 7, 1962), cert. denied 373 U.S. 914; Texas State AFL-CIO, et al. v. Kennedy, 330 F. 2d 217, 219 (C.A.D.C., 1964), cert. denied 379 U.S. 826; Pittsburgh Hotels Association, Inc. v. Urban Development Authority, 309 F. 2d 186

(C.A. 3, 1962), cert. denied 372 U.S. 916 (1963); Pennsylvania Railroad Co. v. Dillon, 335 F. 2d 292 (C.A.D.C., 1964), cert. denied 379 U.S. 945 (1964); Berry v. Housing and Home Finance Agency, 340 F. 2d 939 (C.A. 2, 1965).

In this particular case the contribution required of the employers is a tax (see Section 8H of the Act, 45 U.S.C. 358(h), H. Rept. No. 2668, 75th Cong., 3rd Sess., p. 8); Railway Express Agency v. Kennedy, supra. Consequently, the case is governed by the principles established in Frothingham v. Melon, 262 U.S. 447 (1923) which denied to a Federal taxpayer the right to enjoin expenditures of federal moneys. In the case of Railway Express Co. v. Kennedy, supra, the Court of Appeals said (p. 804):

> "It has been many times held that a taxpayer of federal taxes has no standing to sue to prevent the expenditure of federal funds under a statute which he claims to be unconstitutional, even though such expenditure might possibly result in an increase in the taxes which he will eventually be compelled to pay. Some substantial and more immediate harm must be shown to present a justiciable question concerning the state's power. The injury as it appears from this record, is neither so certain nor so substantial as to justify a finding, upon that showing, that appellants' substantial rights have been or will be invaded by allowance and a payment of the award. . . In the instant case also the injury of which the plaintiff is complaining is only a future possibility. . . ."

A similar result was reached by the Supreme Court in Gange Lumber Co. v. Rowley, 326 U.S. 295 (1945). In that case employers contributed to a state insurance fund for the benefit of injured workmen. A workman applied for compensation, and the employer

contended that the allowance of the claim was in violation of the authority of the administering agency. The United States Supreme Court pointed out that the State Supreme Court had noted that the funds were "in no sense the private property of the employer. Consequently, the payment of the award out of the fund in itself could not amount to a deprivation of the employer's property." With respect to the possibility of a rate increase the Court stated "It is entirely problematical whether an increase will follow, or, if so, whether it will be wholly mathematical and infinitesimal or substantial in its ultimate effect upon appellant This being so appellant's complaint comes down, on the record, to nothing more than the bare possibility of some injury in the future."

Although the sum involved in the instant action is considerably larger than that involved in the Gange or the Kennedy cases, the net result is the same. That is, it is entirely problematical whether any change in rates will follow, whether it will be infinitesimal or substantial; and accordingly there is no more than a bare possibility of some injury in the future. 1/

1/ To show a substantial interest (putting aside as moot the insurance benefits already paid) appellants rely upon a statement by the Management member of the Board that the wasting of the fund, so-called, in this matter could result in an increase in the rate. This is unsupported speculation. The amount now involved according to appellants of about $650,000 (R. 176) is of no real significance in the context of the unemployment insurance fund. The rates are prescribed as follows:

(continued on page 14)

The appellants contend that even though a federal taxpayer is involved the issue to be resolved is the proportionate interest of the plaintiff, and appellants appear to contend that if federal taxpayers can show a more substantial interest than that suggested in Frothingham v. Melon, then the Federal Court has jurisdiction. There is no authority for this position. The principles of the Frothingham case to the effect that federal taxpayers cannot attack the expenditure of federal funds in the control of the Government is still the rule in effect. 2/

1/ (continuation)

Balance in Account as of September 30 (in millions)	Rate for calendar year
$450 or more	1.5%
$400 but less than $450	2.0%
$350 but less than $400	2.5%
$300 but less than $350	3.0%
Less than $300	4.0%

It will be noted that the rates change when the account fluctuates by increments of $50,000,000 or more. Thus, it is quite absurd to speculate that the payment of the remaining dwindling amount or indeed of the total amounts that may possibly have been paid throughout the period is likely to cause an increase in the rates. It is far more reasonable to surmise that if there is an increase in the rates it will have nothing to do with the amounts involved in this action. It is also self-evident that a decrease in the rates, considering the present deficit of ~~$280,000~~ $270,000,000 is remote indeed (an estimated 35 years)(R. 86).

2/ In support of their standing argument appellants appear to rely upon United States v. Butler, Stark v. Wickard, Coleman v. Miller, Reynolds v. Wade and Smith v. Virgin Islands. Only one of these cases (Butler) involved a federal tax. There the Court held that wheat processors had standing to attack the constitutionality of an Act, an incidental feature of which was the processing tax. In the instant case the right to tax is not at issue -- but the right to interfere with the disposition of tax moneys.

The decision of the Seventh Circuit Court of Appeals in Kennedy that an employer has no standing to challenge the Board's actions in approving claims for benefits is sound and should be followed by this Court.

III

THIS ACTION CONSTITUTES AN UNCONSENTED SUIT AGAINST THE GOVERNMENT

As stated in Dugan v. Rank, 372 U.S. 609, 620 (1963):

> "the general rule is that suit is against the sovereign if 'the judgment sought would expend itself on the public Treasury or domain, or interfere with the public administration,' Land v. Dollar, 330 U.S. 731, 738 (1947), or the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act,' Larson v. Domestic & Foreign Corp., 337 U.S. 704 (1949); Ex parte New York, 256 U.S. 490, 502 (1921)."

It is evident that an action to enjoin officials of the Railroad Retirement Board from paying unemployment insurance provided by the Act operates directly against the United States since it would interfere with the statutory program set up for the benefit of unemployed railroad employees, and would thus constitute "interference with the public administration," Land v. Dollar, 330 U.S. 731, 738 (1947). Also see Malone v. Bowdoin, 369 U.S. 643 (1962); Panama Canal Co. v. Grace Line, 356 U.S. 309 (1958).

The United States has not consented to this suit.[3/] Appellant

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3/ 28 U.S.C. 1331 does not authorize suits against the United States. Henderson v. United States, 229 F. 2d 673, 677 (C.A. 5, 1956); cf. Blackmar v. Guerre, 342 U.S. 512, 515-516 (1952). Nor is there any authority to support the proposition that 28 U.S.C. 1337 authorizes injunction or mandamus actions against the United States.

seek to bring this action within the scope of the rule that a suit to enjoin federal officers who have exceeded their statutor authority is not a suit against the United States. See Dugan v. Rank, 372 U.S. 609, 620 (1963). In this regard, appellants cont that the Board violated that portion of the statute that author and directs the Board "to make findings of fact with respect to any claim for benefits. . . ." 45 U.S.C. 355(b). (Brief, p. 56.)

The Board has found that C(6) firemen who accepted severanc pay rather than a comparable job under the Arbitration Award should not be considered to have voluntarily left work within the meaning of the Railway Unemployment Insurance Act. The Board has further found that C(6) firemen who rejected comparab work and accepted severance pay under the Arbitration Award should not be considered to have rejected suitable work without good cause within the meaning of this statute. Appellees argue that the Board is required by statute to make individual findin on these issues in regard to each C(6) fireman instead of makin findings, as above, which are applicable to all such C(6) firem

Contrary to appellees' arguments, the statute contains no requirement that the Board make "individual" findings. The abo findings by the Board were made "with respect to any claim for benefits. . ." made by C(6) firemen. The statute requires noth more. Common sense alone refutes appellants' argument. By mak uniform findings on facts common to certain groups of claimants the Board is able to process applications both more rapidly and

more equitably. Furthermore, Section 5(b) authorizes the Board to establish such procedures as it may deem necessary or proper for the determination of a right to benefits.

Any doubt as to the validity of the Board's procedure in making uniform findings on the above two issues is refuted by the affidavit of Mr. Harold Bishop (R. 220). As that affidavit shows the Board has, in the past, regularly made similar uniform findings in regard to other groups of applicants. (R. 221, 222.) Where an administrative practice, such as this, has been consistently followed and has not been disapproved by Congress in the course of several amendments to the applicable statute, the practice is presumed valid absent overwhelming evidence to the contrary. See, e.g., Boesche v. Udall, 373 U.S. 472, 483 (1963); Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 313 (1933) Whattoff v. United States, 355 F. 2d 473, 478 (C.A. 8, 1966); Hood v. United States, 256 F. 2d 522, 527 (C.A. 9, 1958).

It is clear that, as stated by the District Court, "in this matter the Board has acted well within the limits of the discreti vested in it by law." (R. 143.) Cf. Brotherhood of Railway and Steamship Clerks, etc. v. Railroad Retirement Board, 239 F. 2d 37 (D.C. Cir., 1956) (Board's finding affecting all claimants upheld no question raised of necessity for individual findings).

Since appellants answer to the issue of unconsented suit is the alleged failure of the Board to make individual findings, and

since there is no such requirement the decision of the District Court should be affirmed.[4/]

IV

THE APPELLANTS HAVE FAILED TO JOIN INDISPENSABLE PARTIES

If the appellants were to succeed in this action and an injunction were to issue prohibiting further payments, pending further action of the Board, the C(6) firemen receiving compensation would be adversely affected immediately, if not permanent since their unemployment insurance payments would stop forthwith Under these circumstances, it appears that these recipients are indispensable parties, since a judgment in this case would adversely affect their direct interest. See Montfort v. Korte, 100 F. 2d 615, 617 (C.A. 7, 1938); Metropolis Theater Co. v. Barkhausen, 170 F. 2d 481, 485 (1948), cert. denied 336 U.S. 945

Of course, the Board in this action is contesting the reque for an injunction, but for different reasons than might be advanced by legal representatives of the affected C(6) firemen. The Board has no financial interest in the outcome of the litigation whereas the employees have a direct financial interest which they would be in a better position to assert than the Boar

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4/ As we shall point out in a subsequent section of this brief even were the Court to rule that individual findings were requir such a requirement was met. (See Section V(B) of this brief).

On this point see Litchfield v. Register and Receiver, 9 Wall. (U.S.) 575 (1869); Denver & Rio Grande Railroad Co. v. United States, 124 Fed. 156 (C.A. 8, 1903).

The District Court found that the injunctive relief sought by appellants "would adversely affect . . . the interests of the so-called C(6) firemen who are neither parties to nor represented in this action." (R. 251). This action should not proceed without some representation of these men.

V

THE BOARD'S DETERMINATIONS AND PROCEDURES WERE NOT ARBITRARY OR CAPRICIOUS, BUT WERE IN ACCORD WITH THE ACT

A. The Decision of the Board that a Claimant of Insurance Benefits did not Leave Work "Voluntarily" and did not Refuse to Accept Suitable Work Available and Offered to Him "Without Good Cause" by Electing to Reject Other Employment and to Accept the Severance Pay in Accordance with the Provisions of the Arbitration Award, Should not Be Disturbed by this Court.

As is commonly known, the railroads and certain labor unions were engaged in a long dispute concerning the continuing need for firemen, in view of the development of the diesel engine. Althoug many years were devoted to negotiations in the hope that the dispute could be resolved amicably the parties were unsuccessful in reaching an accord. After all of the procedures of the Railway Labor Act had been completed and the parties were left to self-hel the labor unions called a strike. In view of the national emergen

Congress passed an act in 1963 appointing an Arbitration Board composed of representatives of the unions, of the carriers and of the public, to make an arbitration award which would resolve the conflict. That Board did formulate an award, and the paragraph concerned herein is paragraph C(6) which provides in substance that all firemen with more than two and less than ten years seniority shall retain their rights to engine service assignments unless and until offered another comparable job such as engineer, fireman, brakeman or clerk, which offer shall carry with it guaranteed annual earnings for a period not exceeding five years equal to the compensation received by the employee in the preceding twelve months. The fireman must either accept the offer of a comparable job or forfeit his employment and seniority rights and take the severance allowance provided for in paragraph C(3). (The full text of paragraph C(6) can be found in Appendix A of Appellants' Opening Brief.) A large number of firemen, upon being faced with the alternative of taking another type job or taking severance pay, elected to accept severance pay thereby terminating their employment with the railroad. Many of these persons were unable to secure other work and subsequently applied for unemployment insurance under the Act. The question on the merits is first whether the Board's determination that the firemen were and are entitled to receive such payments is an arbitrary or capricious decision and second whether any mandatory provision of the Act was violated by the form of this decision.

The Act, 45 U.S.C. 354(a-2), provides that a claimant of insurance benefits is not to be considered unemployed if the Board finds that he "left work voluntarily without good cause," or "failed without good cause to accept suitable work available and offered to him." The Board ruled that a fireman who elects to take severance pay rather than a comparable job has not left his work voluntarily under the Arbitration Award. The Board also ruled that the election to take severance pay rather than another job was not a refusal of suitable work "without just cause". In short, the Board ruled that the award gave the firemen, upon having their jobs as firemen abolished, a free election which would not result in denial of the benefits of the Unemployment Insurance Act. These rulings seem fair and reasonable. It is clear that the purpose of the Arbitration Award was to give C(6) firemen a perfectly free choice. If by choosing to reject the offered job and take severance pay the C(6) firemen would forfeit their future rights to unemployment benefits, then their choice would not in fact be free. Thus, it was clearly reasonable for the Board to find that the effectuation of the Arbitration Award necessitated a finding that no C(6) fireman who accepted severance pay should be considered to have left his job voluntaril or to have rejected suitable work without good cause. As Mr. Garland in his affidavit pointed out:

> "It was concluded that a C(6) fireman exercising the right of choice given him by the Award should not be regarded as doing something

> reprehensible from the social insurance standpoint which would disqualify him for benefits. Consequently, following informal consultation with the Bureau of Law, Mr. Carter in his memorandum advised the Regional Directors and the Chief of Claims Operations that such a fireman was not to be regarded as having failed to accept suitable work within the meaning of Section 354(a-2)(ii). Since the fireman was regarded as having 'good cause' for what he did, there was, of course, no necessity for investigating the suitability of the work offered him. . . . The fact that a C(6) fireman who chose to take a separation allowance was not to be regarded as subject to the disqualification provisions mentioned above did not mean that every such employee was to be regarded as entitled to unemployment benefits. All the basic qualification and eligibility requirements of the Act would, of course, have to be met. The availability requirement in particular would be very carefully considered in the case of such an employee and benefits would not be paid him if under all the circumstances he could not be regarded as ready and willing to work and as making such efforts to secure employment as would be reasonable under the circumstances." (R. 92.)

Appellants contend that the severance pay was intended to tide the men over while they looked for other work, and that they should not be able to pocket both severance pay and unemployment benefits. However, the Act explicitly provides money to unemploye workers to tide them over periods of unemployment. Accordingly, there was no necessity for the Arbitration Board to provide funds for the same purpose. The real purpose of the severance pay was expressed in the following testimony which took place before the Senate Committee on Commerce on the Hearing on Administration of Public Law 88-108, August 30, 1965.

"Mr. Habermeyer. Well, the only way we got involved in that at all was this: Under the provisions of the Arbitration Award, certain of these firemen, after being told that they were being removed from their job as firemen, had a choice to make. They could take a lump sum amount of money --

Senator Magnuson. Did you apprise them of their severance pay?

Mr. Habermeyer. No, we didn't but they knew about that, and they had a choice to make of either taking a lump sum and removing themselves from the carrier entirely, or taking a job that the carrier offered them. Now, we do have a restriction of payment of unemployment benefits if a man voluntarily quits his job.

Senator Lausche. May I put this question?

Senator Magnuson. Yes, go right ahead.

Senator Lausche. In the event the worker agreed to accept a severance pay reimbursement, would that disqualify him from the right to obtain unemployment compensation?

Mr. Habermeyer. No, sir. It did not.

Senator Lausche. It did not?

Mr. Habermeyer. It did not.

Senator Lausche. That is, if he voluntarily says, 'I'll quit my job if you give me a severance pay'?

Mr. Habermeyer. I wouldn't say he was voluntarily quitting his job as a fireman. The carrier told him he was being separated from his job as a fireman. They offered him an alternative then of taking a sum of money or another job. And we held that the offer of the other job was not a voluntary action on this man's part in separating himself from the industry and he took the lump sum payment.

Senator Lausche. That would mean a worker who took a severance pay under your decision was not construed to have quit on his own?

Mr. Habermeyer. That's right.

Senator Lausche. And since he did not quit on his own, he was entitled to unemployment compensation?

Mr. Habermeyer. Yes sir.

Senator Magnuson. I think that was the right ruling.

Mr. Habermeyer. That's the only way we got involved.

Senator Magnuson. Severance pay was not involved in his unemployment. It was merely a so-called bonus?

Mr. Habermeyer. An alternative that they offered him."

As we understand appellants' argument they do not challeng the Board's right to make blanket rulings which cover all perso falling in a specific class, but they deny that all the C(6) fi men applying for insurance benefits could have been properly placed in one class. For example, they allege that some firemer quit their jobs and took severance pay before being required to make an election -- that is they voluntarily quit before being confronted with the prescribed option. Then, some firemen, so appellants allege, must have been offered other employment whic they rejected, electing to take the severance pay. Then, if th same firemen subsequently took the proffered jobs, their own actions established that they were "suitable". Appellants argu that if they were "suitable" at a later date they must have bee "suitable" at the earlier date.

The answer is that the Board ruling (whether this was, in fact, a proper Board ruling, is covered in the next section of this brief) covered all firemen who, under the Arbitration Award, were faced with the option of taking another job or of taking severance pay, and as to them ruled that if they elected to take the severance allowance they would not be deprived of the benefits of the Act. Thus, if a fireman were given a severance allowance before his job was eliminated, he would not be covered by the ruling. But where, as here, if a fireman's job were abolished and he was offered another job his refusal of the offered job in the first instance would be with just cause. The just cause was the determination of the Board that the refusal of a comparable job and the acceptance of the severance pay should not penalize him insofar as the insurance benefits were concerned. But once he had received the benefit of this ruling he could not continue thereafter to reject suitable employment on the basis of the Award He would be treated exactly the same as other employees who were not involved in the Award. (R. 135d.)

We submit, therefore, that the ruling did apply to a general class, and that it was as sensible a ruling as could have been made. However, let us accept arguendo appellants' contention that the severance pay was in lieu of unemployment insurance, and follo through on such a decision. Initially, it would require the Board to determine how much each employee received, and how long the severance pay award would be considered to prohibit the employee

from claiming unemployment insurance payments. Such a ruling, apart from the massive statistical work involved would not present the C(6) fireman with a free option. By taking the severance pay the fireman would forfeit unemployment insurance of an equal amount. Or take the situation where the employee takes the severance pay and then gets another job, would the employee be required to pay back the severance pay? Or if this employee then loses his new job, would he then have no right to unemployment benefits until the severance pay was used up -- even though he spent the severance pay months before for a new car? Examples of this nature could be endlessly multiplied. They would only show the impossibility of the Board reaching any practical and equitable decision, other than the decision which is challenged herein by appellants.[5/]

Appellants also attempt to make some capital out of the Board's directive that an employee's resignation to take several allowance is voluntary if "provisions of the agreement or plan under which the severance allowance is paid are such that the employee could have continued working for his employer in his same occupation and at the same location, with prospects for fu employment not substantially diminished." (Brief, p. 27.) Of course, this provision has no relationship to the Arbitration A

5/ For a more detailed discussion of this and other directive see the Bishop affidavit. (R. 220, 225-226.)

That Award was based on exactly the contrary assumption -- that the fireman jobs would be abolished, and that accordingly the fireman obviously could not continue to work at the "same occupation" at "the same location". Appellants by innuendo suggest that unemployment benefits were paid to firemen who refused to keep on working as firemen at the same location, but there is nothing in the record to support such an assumption.

Appellants further urge that although the Act refers to persons who have "left work voluntarily", the Board has construed the word "work" to mean "job". Appellants are correct. Under the Board's ruling the fireman who accepts severance pay in lieu of another "comparable" job does not lose unemployment insurance benefits. This ruling is quite reasonable. The statute doesn't purport to impress employees into an industry. It provides for unemployment insurance when they are unable to find suitable work. Two steps are contemplated. The first is that the man lose his job, and the second is that he doesn't refuse other suitable work without just cause. Although the statute uses the word "work" it is evident from the general context and the steps involved that Congress was contemplating jobs, not a general employment relationship. (On this point see the explanation of the General Counsel of the Board. R. 135.)

In all events the Act lodges the Board with the authority to determine whether a person had voluntarily left work or refused suitable work without good cause and unless its rulings are

arbitrary and capricious and without any rational basis the Court should not interfere therewith. See Boske v. Commingore, 177 U.S. 459, 470 (1900); Brotherhood of Railway and Steamship Clerks etc. v. Railroad Retirement Board, 239 F. 2d 37, 44 (D.C. Cir., 1956). In Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949) it was pointed out that the authority to make a decision is the authority to make the wrong decision. (Page 695.)[6/]

In the Panama Canal Co. v. Grace Line, 356 U.S. 309 (1957) shipping companies sued to compel the Canal Company, an agency of the United States, to revise its rates, contending that the formula

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6/ In the case of Leedom v. Kyne, 358 U.S. 184 (1958) relied upon by appellants an order was issued by the NLRB which was in flagrant violation of the specific terms of a statute. The question was the jurisdiction of the District Court to review the order. The Supreme Court held that the court had the power to strike down an order in excess of its statutory powers, and contrary to the specific prohibition of the Act.

In subsequent decisions the Court has been careful to restrict this ruling to such instances. See Railway Clerks v. Employees Association, 380 U.S. 650 (1964), and Boire v. Greyhound Corporatio 376 U.S. 473 (1963). In the latter case the Court said that the review authority of the lower court is limited to the question of statutory authority and does not permit "plenary district court review of Board orders . . . whenever it can be said that an erroneous assessment of facts before the Board has led it to a conclusion which does not comport with the law. Judicial review in such a situation has been limited by Congress to the courts of appeals and then only under the conditions explicitly laid down in . . . the Act."

In the instant case there is no question raised as to the authority of the Board to make the challenged payments. The appellants merely contend that the Board's ruling is an unjustified interpretation of the Arbitration Award and of the Unemploymen Insurance Act. These circumstances don't bring the case within the narrow orbit of the Leedom case.

in use was contrary to the Act. The Court ruled against the shipping companies and stated:

> "Where the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms, the very construction of the statute is a distinct and profound exercise of discretion. . . . The matter should be far less cloudy, much more clear for courts to intrude."

In Udall v. Tallman, 380 U.S. 1 (1965) the Supreme Court stated p. 16:

> "When faced with the problem of statutory construction this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. To sustain the Commission's application of the statutory term we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings (citations)."

In concluding the Court said p. 18 "If, therefore, the Secretary's interpretation is not unreasonable, if the language of the orders bears his construction, we must reverse the decision of the Court of Appeals." Also see Wilbur v. United States, 281 U.S. 206 (1929 Adams v. Nagle, 303 U.S. 532 (1938); Christine Mitchell v. McNamar 352 F. 2d 700 (C.A.D.C., 1965); Riverside Oil Co. v. Hitchcock, 190 U.S. 316 (1902).

The Board's conclusions in the absence of compelling evidence of abuse of statutory or discretionary power should not be overrul There is no such evidence in this case.

B. The Board's Procedures Were Not in Violation of its Statutory Duties

The appellants complain of the procedures:

1. The Carter memorandum was not the official action of the Board.

2. The Carter memorandum failed to follow the Act.

3. The Board failed to make individual findings.

These contentions lack any substantial merit.

THE CARTER MEMORANDUM

Section 5(b) of the Act states:

> "The Board is authorized and directed to make findings of fact with respect to any claim for benefits and to make decisions as to the right of any claimant to benefits. The Board is further authorized . . . to establish, by regulations or otherwise, such procedures as it may deem necessary or proper for the determination of a right to benefits."

And under Section 12(m) (45 U.S.C. 362m) the Board is "authorized to delegate to any member, officer or employee of the Board any of the powers conferred upon the Board by this Act, excluding only the power to prescribe rules and regulations." Pursuant to these provisions the Board made the following delegation to the Director of Unemployment and Sickness Insurance which is found at 20 C.F.R. Section 320.5. ". . . Claims shall be adjudicated, and initial determination shall be made, in accordance with instructions issued by the Director of Unemployment and Sickness Insurance. . ." Accordingly, the action of the Director of Unemployment and Sickness

Insurance Mr. Carter, in issuing the June 5, 1964 memorandum, was fully authorized by the statute and regulations.7/

Appellants further contend that the Carter memo improperly stated the ruling which was followed. It declared, in part, "A fireman confronted with this choice who chooses separation from service is not to be regarded as having failed to accept suitable work within the meaning of Section 4(a-2)(ii) of the Act." From this statement appellants argue that the Board had ruled categorically that all jobs of whatever description which were offered to firemen whose jobs were being eliminated were unsuitable. (Brief, p. 29.) They say that Government counsel attempted to overcome this absurd ruling by arguing that the Board had only declared that the refusal of comparable employment would not be without good cause, and that suitability, therefore, was irrelevan Appellants' argument is legal nit-picking at its worst. Mr. Carter did not say that all comparable jobs offered to displaced firemen were unsuitable. He said that the rejection of the job would not be regarded as a refusal of "suitable work within the meaning of the section 4(a-2)(ii) of the Act." And that section provides that suitable employment can be rejected for good cause. Furthermore, on September 24, 1964, long before this action was commenced, the General Counsel of the Board explained the ruling to Gregory Prince, Executive Vice President and General Counsel o the Association of American Railroads. (R. 135a, c.)

7/ A resume of the history of the Carter memo, and of comparable situations is set forth in the Bishop affidavit. (R. 220-226.)

The Lack of Individual Findings

The appellants contend that the Act requires individual findings, and that none was made in connection with the payment of displaced firemen. It is true that the Board did not issue specific findings with respect to each individual fireman -- but applied the ruling set forth in the authorized Carter letter.

The processing of insurance benefit claims is described in the Garland affidavit. (R. 87-93.) In brief, claimants fill out a form (R. 94) which is filed in a District Office. There it is examined to determine whether the claimant meets the eligibility requirements and is not subject to the several disqualification provisions. If the claim is approved it is forwarded to the appropriate division for payment. If it is denied, the applicant can take advantage of the administrative appeals procedures. (R. 89-90.)

As shown by the Railroad Retirement Board (1965 annual report at pages 37 and 42) there were in the year 1964-1965, 111,000 railroad workers who claimed and were paid unemployment insurance benefits and in 1957-1958, 312,000 workers were receiving insurance benefits. Of course, it would be physically impossible for a Board to consider and make findings with respect to each one of these claims, particularly since each beneficiary registers and claims benefits every fourteen days. (45 U.S.C. 351(h).)

Ordinarily the District Office accepts the certifications set forth in the claim form, but in the event it receives other information raising a doubt as to the claimant's rights an investigation is made. (R. 90.) When information is received which

suggests problems are about to arise concerning groups of employee an investigation is promptly made, and rulings issued, so that delays in the processing of applications will be avoided. Such an instance was the Arbitration Award (R. 91, 221-226) and the Bishop affidavit, after a careful recitation of the applicable rules states:

> "The claims of C(6) firemen have been handled in strict accordance with the terms of the statute and with the regulations and practices of the Board. Both procedurally and substantively, the application of the disqualification provisions has been entirely consistent with the application of those provisions prior to the Carter memorandum of June 5, 1964." (R. 226.)

With regard to the specifics of appellants' contention -- the statute relied on reads as follows: "The board is authorized and directed to make findings of fact with respect to any claim for benefits and to make decisions as to the right of any claimant to benefits." (Section 5(b), 45 U.S.C. 355(b).) Other sections provide for the finality of findings of fact (45 U.S.C. 355(f)(g).) Appellants read the statute as requiring the Board to issue findings for each claim. The statute makes no such requirement. Actually, under 45 U.S.C. 362(i), the Board may accept the claimant's registration as initial proof of unemployment, sufficient to certify payment. Furthermore, Section 5(b) of the Act (45 U.S.C. 355(b)) authorizes the Board to establish such procedu as it may deem necessary or proper for its determination of a righ

to benefits. The Board's action in regard to the C(6) firemen is not only authorized by Section 5(b), but also makes possible the acceptance of registration by C(6) firemen as a basis for payment of benefits.

Findings of fact are required in statutes of this description so that a review body will have a competent record before it. In this case the Carter letter was a finding of fact and conclusio of law with respect to all C(6) firemen; and as this case establishes it has furnished the appellants and the Court with sufficient information of the Board ruling to make a dispositive ruling. Furthermore, even if the statute did require individual findings the claim filed by the applicant, with its certifications when accepted and acted upon by the Board certainly constitute findings. We submit that this aspect of the appellants' argument is without any merit whatsoever. The reasonableness of making one general finding in situations involving facts common to many claim has been judicially approved. See Brotherhood of Railway and Steamship Clerks v. Railroad Retirement Board, 239 F. 2d 37 (C.A. D.C., 1956) and Railway Express Agency v. Kennedy, supra.[8/]

8/ Contrary to the suggestion in the footnote on page 55 of the Appellants' Opening Brief as to the findings being considered in the Kennedy case, the record of the Kennedy case shows that the action of the Director of Unemployment and Sickness Insurance was precisely the same there as in the instant case. At pages 36-37 of the transcript of record in the Kennedy case there appears the following extract from the November 1, 1950 affidavit of Horace L. Carter, Director of Employment and Claims, Railroad Retirement Board:

(continued on page 35)

CONCLUSION

Appellants are firmly convinced that the rulings and procedures of the Board were entirely correct. However, this Court

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8/ (continuation)

"4. Since claims for benefits under the Act are made for short periods, and each claim involves a relatively small amount, the adjudication procedure has been made as simple as possible to permit expeditious handling of large volumes of claims. As indicated in Section 320.5, it consists principally of examining the application and claim forms and entering thereon a determination regarding the compensability of the days claimed as days of unemployment or sickness. When the circumstances so require, further evidence is secured by correspondence or field investigation.

"5. Under instructions issued by the Bureau of Employment and Claims pursuant to the provisions of Section 320.5, a regional office which has for adjudication claims, such as those in the instant case, involving the strike provisions of Section 4(a-2)(iii) of the Act, is required to make a thorough investigation of all relevant phases of the case and to submit the information thus obtained to the Bureau of Employment and Claims for review. The Bureau reviews the matter and advises the regional office whether or not the disqualification provision is applicable. The regional office then adjudicates the claims. If the claims are denied, the administrative review provisions contained in Part 320 of the Regulations are applicable.

"6. The procedure described above was followed in the instant case. The Board's New York regional office made a thorough investigation of the strike, securing detailed information both from the Railway Express Agency, Incorporated, and from the employees' Labor organization. Upon reviewing the information thus secured, I advised the regional office by teletype on October 9, 1950, that Section 4(a-2)(iii) was not applicable. The regional office then proceeded with the adjudication of the claims."

should not reach the merits since it is quite clear that the appellants have no right to challenge the Board's payment of insurance benefits to C(6) firemen since the Act explicitly limits judicial review at the instance of an employer to certain matters, not including the payment of claims to recognized employees. For these, and the other jurisdictional bars discussed herein we respectfully submit that the judgment of the District Court should be affirmed.

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January 1967

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CARL EARDLEY
Attorney, Department of Justice,
Washington, D. C., 20530.

Nos. 20785 and 21377

In the

United States Court of Appeals

For the Ninth Circuit

THE WESTERN PACIFIC RAILROAD COMPANY and the SOUTHERN PACIFIC COMPANY, suing on their own behalf and on behalf of all other railroads similarly situated,

Appellants,

vs.

HOWARD W. HABERMEYER, THOMAS M. HEALY, and A. E. LYON, individually and as members of the Railroad Retirement Board, et al.,

Appellees.

Reply Brief for Appellants

Appeals from the District Court for the Northern District of California, Southern Division

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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INTRODUCTION

The briefs of appellees and of *amicus curiae* largely fail to meet the arguments advanced by appellants in their opening brief. The authorities cited by appellants are substantially ignored; the authorities relied upon and the arguments made by appellees and *amicus* are frequently beside the point; and the principal defense which is made of the Board's actions is premised upon a fundamental distortion of appellants' argument.

The purpose of this reply is to deal, as summarily as possible, with the basic errors in the opposing briefs, and to suggest the ways in which they are most clearly in need of correction.*

ARGUMENT

I. It Is Unquestionably the Board's Duty Under the Statute to Explore the Individual Circumstances of Applicants for Benefits Where Those Circumstances Are Crucial to the Question of Eligibility.

The Act provides, in unmistakable terms, that prior to the payment of unemployment benefits, the Board must make "findings of fact" and "decisions" concerning the right of any claimant to receive such benefits, including findings concerning the applicability of each of the disqualification conditions (Sections 4(a-2), 5(b)). If these provisions are to mean anything, they necessarily mean that the Board *must* make some reasonable effort to determine whether each claimant has "left work voluntarily" without "good cause," or has "failed, without good cause, to accept suitable work"—and that, where the individual circumstances are crucial to eligibility, the Board *must* explore those individual circumstances. As has already been shown (Br. 20-32)† and as is in fact admitted by appellees (R. 91-92), the Board made no effort whatever to examine, upon an individual basis, the eligibility of any single one of the thousands of C(6) firemen applying for benefits.

The only relevant response which could be made by appellees concerning their failure to consider the individual circumstances of the C(6) firemen would be that those circumstances were

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*No response has been made to Part III of the argument in appellants' opening brief and nothing further will be said here about those matters. Parts II and III of the present argument touch upon the matters dealt with, respectively in Parts I and II of appellants opening argument. Part I of the present argument responds to appellees' apparent misconception of the duties of the Board under the statute.

†References in this brief are thus: to appellants' opening brief: (Br. 10); to appellees' brief: (Appellees' Br. 20); to the brief of *amicus curiae*: (Am. Br. 15); and to the record: (R. 157).

wholly immaterial to the matter of eligibility for benefits. Appellees do attempt such an argument, but, as has already been seen (Br. 20-32), and as will be further illustrated below (Part II, *infra*) it must fail for two reasons: appellees' interpretation of the statute, upon which their argument is necessarily premised, is manifestly unreasonable; and, even if that interpretation were accepted, it would fail to dispose of the eligibility of many C(6) firemen as to which the individual circumstances would still remain controlling.

Appellees do not rest, however, with efforts to justify the propriety and relevance of the Carter memorandum. They also find it necessary to misstate altogether appellants' view of the Board's duties under the statute; to assert that individual findings are not required even when the individual circumstances are dispositive of eligibility; and to argue that, by reason of certain administrative practices of the Board, individual findings concerning the C(6) firemen may actually be deemed to have been made (even though it is elsewhere admitted that they were not).

First: Appellees, perhaps deliberately, seek to distort the nature of appellants' argument. Appellees suggest that under appellants' interpretation of the statute, the Board must issue individual findings for each claim even when all relevant facts are wholly common to a group of claimants and the individual circumstances could therefore make no conceivable difference (Appellees' Br. 32-34, 16-17). Having erected this straw man, appellees then proceed to attack it. They argue that it would be "physically impossible" to make individual findings with respect to the many thousands of men claiming unemployment benefits each year (Appellees' Br. 32) and that, therefore, "common sense alone refutes appellants' argument" (Appellees' Br. 16). As *amicus curiae* had no difficulty in perceiving, however (Am. Br. 18-19), appellants advance no such argument. Indeed, and as is perfectly clear from their opening brief (Br. 20-21) appellants say no more, and the statute can conceivably require no less, than that the Board explore the individual circumstances where, as here, they are dispositive of the question of eligibility.

Second: Appellees next appear to argue that the Board need not examine the individual circumstances even when the eligibility of the claimant may turn upon those circumstances. Thus they say that blanket rulings were made by the Board in both *Kennedy* and in *Brotherhood of Ry. & S.S. Clerks v. R.R. Retirement Bd.*, 239 F.2d 37 (D.C. Cir. 1956), and that "no question was raised in those cases concerning the absence of individual findings by the Board"; and they imply, on the basis of these cases, that no individual findings need be made in any situation in which substantial numbers of claimants might be involved (Appellees' Br. 8, 17, 34, 35). Appellees fail to note, however, that the sole substantive issue in both the *Kennedy* and *Brotherhood* decisions was whether the claimants there involved were disqualified by the provisions of Section 4(a-2)(iii) of the Act, which forbid the payment of benefits to men who are unemployed because of an unlawful strike, an issue which could be and was determined without any need for consideration of the circumstances of the individual strikers. Moreover, both the District Court and the Court of Appeals in *Kennedy* obviously assumed that, with respect to any additional matters which might have affected individual eligibility, the Board had complied with its statutory duty. See the discussion in appellants' opening brief (Br. 55 footnote), and, in particular, see the affidavit of H. L. Carter in the *Kennedy* case, to which appellees themselves refer.*

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* "Upon reviewing the information thus secured [from an investigation of the circumstances of the strike], I advised the regional office by teletype on October 9, 1950, that Section 4(a-2)(iii) was not applicable. *The regional office then proceeded with the adjudication of the claims.*" (Emphasis added.) (Appellees' Br. 35)

Appellees also assert that their supposed "administrative practice" of making blanket rulings with respect to large groups of applicants has been legislatively affirmed because Congress has not seen fit to put a stop to it (Appellees' Br. 17). But appellees point to no single instance in which this supposed "practice" has been considered by Congress, and they refer to no previous situation where, as here, the Board, by means of a general ruling, has sought to avoid its obligations under the statute to make individual findings as to matters upon which the individual facts are indispensable.

Third: Appellees' final argument is the most curious of the lot: Even assuming that the statute requires individual findings as to all relevant matters, and even admitting that in the case of the C(6) firemen, those matters were not even considered, appellees argue that the Board has nevertheless complied with the command of the statute. Such compliance, it is said, consisted of the Board's acceptance of "the claimant's registration as initial proof of unemployment, sufficient to certify payment," which actions "certainly constitute findings" (Appellees' Br. 33-34). Such bootstrap logic is indeed difficult to take seriously. Surely appellees do not contend that they are entitled to honor any claim, no matter how unfounded, simply because it has been filed. The provisions of the statute are directly to the contrary. Neither can appellees plausibly argue that the "acceptance" of such a claim can possibly constitute "findings" by anyone as to the matters which, pursuant to the directions of the Carter memorandum, were expressly made immaterial: whether, on the basis of the individual circumstances, the C(6) firemen left work with "good cause"; whether the comparable jobs constituted "suitable work"; and, if so, whether those jobs were rejected "without good cause."

II. The Payment of the Unemployment Benefits to the C(6) Firemen Was Contrary to the Statute and in Excess of the Jurisdiction of the Board.

A. THE BOARD FAILED TO DETERMINE, AS THE STATUTE REQUIRED, WHICH OF THE C(6) FIREMEN HAD "LEFT WORK VOLUNTARILY" WITHOUT "GOOD CAUSE" (SECTION 4(a-2)(i)).

Insofar as the language of the statute is concerned, appellees' principal defense of the Board's conduct continues to be based upon their construction of the word "work"—that it refers, not to a man's work with the railroad, but to the particular duties upon which he may, from time to time, be engaged (Appellees' Br. 27).* As appellants have shown at some length, such a

*Appellees also apparently contend that the severance allowance, rather than performing the same economic function as unemployment benefits,

construction would contravene the manifest purpose of the Act, its carefully balanced disqualification conditions and the understanding of Congress concerning its meaning at the time it was enacted (Br. 23-26). Appellants' arguments are not met, and the statutory and legislative materials adduced in support of them are ignored.

Moreover, appellees now appear to concede, as appellants have argued (Br. 27-28), that even if their interpretation of the statute were correct, it would still not dispose of need for individual findings in the cases of many of the C(6) firemen. Thus appellees admit (Appellees' Br. 25) that those firemen who quit their jobs before those jobs were eliminated would not be covered by the terms of the Carter memorandum (See Br. 28). Yet it is alleged in the verified complaint (R. 16-17), and it is undisputed by appellees, that such firemen were in fact paid unemployment benefits pursuant to the Carter memorandum. Since the Carter memorandum admittedly did not apply, the payment of these benefits, without prior findings concerning eligibility, was in clear violation of the terms of the statute.

Appellees also apparently agree that if a man were offered another fireman's position as a "comparable job," he would, under the Board's own regulations, have "left work voluntarily" (Appellees' Br. 26-27; see also Br. 27-28). Appellees argue that

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was instead some sort of "bonus" having a different purpose altogether. Appellees refer, in this connection, to a colloquy between appellee Habermeyer and Senators Lausche and Magnuson which took place on August 30, 1965, some 22 months after the issuance of the Award and some 14 months after the promulgation of the Carter memorandum (Appellees' Br. 22-24). The exchange casts little light upon the supposed "real purpose" of the severance allowance. It does disclose, however, that though Senator Magnuson may have been pleased with appellees' actions concerning the C(6) firemen, Senator Lausche was apparently astounded by them. In any event, neither the self-serving statements of appellee Habermeyer nor the offhand opinions of Senators Lausche and Magnuson are pertinent here. Surely appellees do not suggest that these matters can conceivably constitute "legislative history" worthy of consideration by this Court. Moreover, it is unclear how appellees' argument, even if it were supported in the record, would cast light upon the meaning of the words "left work voluntarily" as used in the statute; and that, after all, is the matter which is presently in issue.

this situation has "no relationship" to the Award—which, they imply, did not contemplate the offer of a fireman's job—but they necessarily ignore the provisions of the Award which define the comparable jobs as those "such as, but not limited to engineer, fireman (helper), brakeman or clerk" (Br., App. A, p. 1). Appellees argue that the record does not disclose whether such fireman jobs were in fact offered to any C(6) firemen; but the argument puts the shoe upon the wrong foot. Where, as here, a particular comparable job contemplated by the Award might clearly have disqualified the applicant for benefits, it was the Board's duty to determine whether such a job was in fact offered—and whether none, some, or many of the C(6) firemen might thereby have been disqualified. In making the payments without looking at the facts—in assuming away the problem—the Board plainly failed to perform its duty under the statute.

B. THE BOARD FAILED TO DETERMINE, AS THE STATUTE REQUIRED, WHICH OF THE C(6) FIREMEN WHO REJECTED THE OFFERS OF "COMPARABLE JOBS" THEREBY "FAILED WITHOUT GOOD CAUSE TO ACCEPT SUITABLE WORK" (SECTION 4(a-2)(ii)).

Appellees apparently agree that the comparable jobs offered to the C(6) firemen might well have constituted "suitable work" within the meaning of the statute (Appellees' Br. 24-25). Their whole position under Section 4(a-2)(ii) is therefore premised upon the assumption that each of the firemen, in rejecting the comparable jobs, acted with "good cause."

Appellees' original argument in support of their assumption of good cause—that the Award gave each of the firemen "a free choice" to stay or to leave—has already been considered (Br. 32). The argument is plainly irrelevant either to the language or to the purpose of the statute and is therefore entitled to no weight.

Appellees now advance a new and startlingly different argument as to why the suitable work offered to the C(6) firemen was supposedly rejected with "just [sic] cause" (Appellees' Br. 25). It is this:

> "[W]here, as here, if a fireman's job were abolished and he was offered another job his refusal of the offered job in the first instance would be with *just cause*. The just cause was the determination of the Board that the refusal of a comparable job and the acceptance of the severance pay should not penalize him insofar as the insurance benefits were concerned." (Emphasis in original.)

If this statement has any meaning, it must be that the Board itself, by way of the Carter memorandum, *created* the "good cause" (*i.e.,* reliance upon the memorandum) on the basis of which the suitable work offered to the C(6) firemen might freely be rejected. But how can this be? Can the Board, in making a prospective ruling such as the Carter memorandum, proceed upon the assumption that the effect of the ruling has already been felt? It is apparent that the argument defeats itself; for if it were admitted, there could be no evasion of the disqualification conditions of the Act which the Board could not make lawful simply by sanctioning it in advance.

III. The District Court Had Power to Review, at the Instance of Appellants, the Unlawful Actions of the Board.

A. APPELLANTS CLEARLY HAVE STANDING TO CHALLENGE APPELLEES' UNLAWFUL WASTE OF THE FUNDS IN THE ACCOUNT.

Appellees' argument upon the standing issue proceeds throughout upon the assumption that appellants are no different from general Federal taxpayers who contribute to the general Federal revenues, and as such, have no standing to challenge expenditures of the general Federal Treasury. Yet as we have shown at some considerable length (Br. 36-41) that assumption is wholly without foundation. Appellants' argument upon this point has not been met, and, indeed, the controlling authorities have been almost wholly ignored. Thus *Stark v. Wickard,* 321 U.S. 288 (1944), *Coleman v. Miller,* 307 U.S. 433 (1939), *United States v. Butler,* 297 U.S. 1 (1935), *Reynolds v. Wade,* 249 F.2d 73 (9th Cir. 1957) and *Smith v. Virgin Islands,* 329 F.2d 131 (3d Cir. 1964) have all been relegated to a footnote and distinguished upon the supposed ground that only one of them (*Butler*) "involved a

federal tax" (Appellees' Br. 14). Appellees' supposed distinction is both inaccurate and misleading. It is inaccurate because *Stark, Reynolds* and *Smith* each quite plainly involved the expenditure of taxes levied under Federal law.* It is misleading because the whole point of each of these cases is that the principle of *Massachusetts v. Mellon* cannot and will not be applied where, as here, the plaintiffs are something *other* than general Federal taxpayers challenging expenditures from the general Federal Treasury.

The additional arguments advanced by appellees and by *amicus* are equally beside the point. Thus appellees cite no less than nine cases in support of the proposition that standing to sue does not exist unless the plaintiff can show a "legally protected interest which has been invaded by the Government" (Appellees' Br. 11-12); but appellees do not explain how this tautology in any way advances their position. Certainly the cases upon which they rely do not even address, much less resolve, the standing issues presented here.

Both appellees and *amicus* continue to insist, solely on the basis of *Kennedy,* that appellants are without standing to sue because they cannot demonstrate precisely *when* (not whether) they will feel the bite of the Board's unlawful disbursements (Appellees' Br. 10, 13-14; Am. Br. 13-14). Yet they fail altogether to explain why, if this were so, any taxpayer would ever have standing to challenge illegal expenditures or why such standing has repeatedly been upheld by the Supreme Court and by this Court in cases such as *Stark v. Wickard, Coleman v. Miller,* and *Reynolds v. Wade* (see Br. 40-41).

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*It is perfectly apparent that the *Reynolds* and *Smith* cases both involved the legality of the expenditure of revenues derived from taxes. It is equally apparent that if, as appellees assert, appellants' contributions to the Account constituted taxes, the same was true of the contributions of the milk producers in *Stark v. Wickard.* (See 321 U.S. at 303 where the contributions were described as "a sales tax.") Neither is there any doubt that the levies paid in each of these cases were grounded upon Federal law: in *Stark v. Wickard,* upon the Agricultural Marketing Agreement Act of 1937, and in *Reynolds* and *Smith* upon the Federal statutes creating the power of the territorial legislatures to tax and upon the enactments made pursuant to the Congressional authority.

B. THE DOCTRINE OF ADMINISTRATIVE DISCRETION DOES NOT IMMUNIZE THE BOARD'S ACTIONS FROM JUDICIAL REVIEW.

Appellees assert that this Court cannot review their interpretations of the provisions of the statute unless those interpretations were "arbitrary and capricious and without any rational basis" (Appellees' Br. 27-28).* Yet appellees make no serious effort to deal with appellants' authorities (Br. 45-49) which demonstrate that no such elaborate self-restraint need or should be indulged. Indeed, only one of appellants' cases—*Leedom v. Kyne,* 358 U.S. 184 (1958)—is even mentioned by appellees, and that in an unpersuasive footnote (Appellees' Br. 28). Nor do the cases upon which appellees themselves rely materially advance their position. Thus in *Udall v. Tallman,* 380 U.S. 1 (1965) (Appellees' Br. 29), the administrative construction was accepted only because it was "quite clearly . . . reasonable" (380 U.S. at 4), and in *Panama Canal Co. v. Grace Line,* 356 U.S. 309 (1957) (Appellees' Br. 28-29), as the quoted passage literally says, the agency's determinations related to "matters of doubtful or highly debatable inference from large or loose statutory terms." Yet where, as here, the statutory command is precise, the words used are ordinary and non-technical, and the agency has obviously not been "left at large," the agency must follow the statute or its order will be set aside. *Addison v. Holly Hill Fruit Prods., Inc.,* 322 U.S. 607, 616-17 (1944) (Br. 46-47).

C. JUDICIAL REVIEW OF THE PRESENT ACTIONS OF THE BOARD HAS NOT BEEN PROHIBITED BY CONGRESS.

Appellees and *amicus* do not dispute the proposition (Br. 50-51) that, unless prohibited by Congress, the courts of the United States have jurisdiction to review all arbitrary agency action. Neither do they deny that if, as seems clear here, the agency has exceeded its statutory authority, all inferences should be indulged in favor of a right of review (Br. 53-56). Their whole argument is therefore premised upon the assumption that the Act expressly

*These words, in the view of appellants, fairly describe the actions of appellees; but the point is of no moment, for the law is not as appellees state it.

prohibits judicial review of the Board actions now in dispute (Appellees' Br. 4-9; Am. Br. 3-7).

The relevant provisions are admittedly found in subsections 5(c), 5(f) and 5(g) of the Act. Appellees and *amicus* cannot and do not contend that judicial review of the actions of the Board granting the claims of the C(6) firemen is prohibited by subsections 5(c) or 5(f); for it is admitted that these subsections deal only with the situations (neither applicable here) where either the claim or the employment relationship has been denied (Appellees' Br. 4-6; Am. Br. 3-4).* Appellees and *amicus* therefore necessarily base their argument on subsection 5(g).

As appellants have previously observed (Br. 53), this subsection also, by its own terms, applies only to matters determined under subsection 5(c), and therefore has nothing to do with the decisions presently in issue. Both appellees and *amicus* deny that this is so, but they have chosen to omit from their quotations of subsection 5(g), as well as from their argument upon the point, the very language which defeats their contention (Appellees' Br. 6; Am. Br. 4). Subsection 5(g) provides, in relevant part (with the critical language underlined):

> "Findings of fact and conclusions of law of the Board in the determination of any claim for benefits or refund, *the determination of any other matter pursuant to subsection (c) of this section,* and [determinations concerning availability of funds] shall be, except as provided in subsection (f) of this section, binding and conclusive for all purposes . . . and shall not be subject to review in any manner other than that set forth in subsection (f) of this section."

If, as appellees contend, *all* findings and conclusions of the Board having to do with claims were to be made conclusive, there would

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*Appellees do assert, citing cases, that where Congress has provided a *particular method* of judicial review, that method must be followed (Appellees' Br. 9); but neither the assertion nor the authorities are relevant where, as here, the judicial review provided in the statute relates to matters *other* than those which are in dispute. See Stark v. Wickard, 321 U.S. 288, 309 (1944) and the other cases cited and discussed in appellants' opening brief (Br. 50-55).

have been no occasion to use the word "other" in the immediately succeeding phrase which expressly limits finality to determinations made pursuant to subsection (c). To give any effect, therefore, to the word "other," the statute must be read to say that finality is accorded *only* to proceedings taken, and findings and conclusions made, pursuant to subsection (c).* Not only is this construction the only permissible one under the language which is directly applicable, it is also that which is most consistent with the remainder of the subsection; for the matters in question are made final only "except as provided in subsection (f)" and subject to review in no manner "other than that set forth in subsection (f)." Since subsection (f) admittedly relates *only* to matters determinable under subsection (c), it is impossible to read the two portions of subsection (g) in *pari materia* without concluding that the matters made final are those described in subsection (c) and reviewable under subsection (f).

Thus, in order to prevail, appellees and *amicus* must go beyond the language of the statute and persuade this Court that it prohibits that which it does not. They therefore resort to legislative history (Appellees' Br. 8-9; Am. Br. 5-6).

It is, of course, axiomatic that legislative history can properly be used in the interpretation of a statute only when it is clear and unambiguous and illuminates directly the question which is at issue.† The question here is this: Whether Congress, in providing

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*Any other construction would violate the fundamental rule that all provisions of a statute must be given effect and that none may be ignored. See Tabor v. Ulloa, 323 F.2d 823, 824 (9th Cir. 1963):

> "The construction . . . adopted by the District Court would appear to render the words 'at law' functionless, and 'a legislature is presumed to have used no superfluous words.' "

†See, *e.g.*, United States v. PUC, 345 U.S. 295, 319 (1953) (Jackson, J. concurring); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 543 (1947). Moreover, special caution must be used where, as here, the matters relied upon are no more than random statements, plucked from thousands of pages of hearings, which were made by witnesses rather than by Congressmen, which were not reflected in the Committee reports, and which, by hypothesis, were not carried forward into legislation. See Schwegmann Bros. v. Calvert Corp., 341 U.S. 384, 395-96 (1950) (Jackson, J. concurring).

a particular procedure for administrative and judicial review of certain actions of the Board, intended to eliminate altogether the inherent right of judicial review which would otherwise exist as to all other Board actions. Nothing in the legislative materials relied upon by appellees and *amicus* even approaches this question.

Appellees first point out that, as one railroad representative remarked during the 1938 hearings prior to the passage of the Act, there was "no appeal provided" in the bill for the railroads—but this observation obviously casts no light upon whether Congress intended that all judicial review *other* than that expressly provided in the statutory scheme was to be *prohibited* by the statute. See *Stark v. Wickard,* 321 U.S. 288, 307-10 (1944).

Again, Mr. Schoene, then as now counsel for *amicus,* stated at one point during some hearings in 1945 that the railroads would have "no appealable interest" in the award of an annuity unless the employment relationship were in dispute; but neither the passage quoted (Am. Br. 5-6) nor any other portion of those hearings indicates that any member of the Committee (much less Congress as a whole) adopted or approved this self-serving observation. Moreover, the statute to which Mr. Schoene's remarks were addressed was not even the statute which is before this Court —it was, rather, old Section 11 of the Railroad Retirement Act, which the bill then before the Committee was intended to replace.*

Amicus' reference to statements by a railroad spokesman at the same hearings (Am. Br. 6) is blatantly misleading—for it is only necessary to read the statements in context to conclude that they had nothing whatever to do with an employer's right of review of decisions granting benefits under the Railroad Unemployment Insurance Act.†

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*See page 327 of the 1945 hearings. Even taken in context, Mr. Schoene's remarks would appear to have been somewhat misleading, for old Section 11 did not even purport to distinguish, as regards appeals by employers, between those which involved the employment relationship and those which did not. Neither did the cases. See Utah Copper Co. v. R.R. Retirement Bd., 129 F.2d 358 (10th Cir. 1942).

†The matter which was said to have been "unreviewable" (Am. Br. 6; Hearings, pp. 558-59) was the establishment by the Board "with the

Thus, as is so often the case, "the legislative history is more conflicting than the text is ambiguous," *Wong Yang Sung v. McGrath,* 339 U.S. 33, 49 (1950), and we are brought round, once again, to the statute. Since the statute does not even deal with the question of review of the matters now before this Court, the normal presumption in favor of the rule of law impels the conclusion that a right of judicial review necessarily exists. *Stark v. Wickard,* 321 U.S. 288, 309-10 (1944).

D. THE DOCTRINE OF SOVEREIGN IMMUNITY DOES NOT INSULATE THE BOARD'S ACTIONS FROM JUDICIAL REVIEW.

Appellees cite numerous cases for the proposition that an action which would interfere with "public administration" is a suit against the sovereign (Appellees' Br. 15), but they concede, as they must, that this rule has no application where Federal officers have "exceeded their statutory authority" (Appellees' Br. 16). At one point in their brief, appellees curiously assert that "in the instant case there is no question raised as to the authority of the Board to make the challenged payments" (Appellees' Br. 28 footnote), but it is precisely that question which appellants raise: Whether the Board, under the terms of the statute, had power to make the payments without exploration of the individual circumstances which were crucial to eligibilty (Br. 20-32; pp. 1-8, *supra*).

If, as appellants argue, the Board's interpretation of the disqualification provisions of the Act was wrong, it is obvious that an investigation of the individual circumstances was essential to the disposition of *all* of the claims of the C(6) firemen—and that the Board's failure to make individual findings prior to the payment of benefits was in violation of the statute in every single instance. There is therefore no way in which the sovereign im-

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cooperation of the employers and employees" of certain industry-wide *standards* of permanent disqualification for purposes of annuities under the Railroad Retirement Act (Section 2(a) 4), a subject which has little apparent relevance to the reviewability of *awards* under the Railroad Unemployment Insurance Act. The matter as to which "the employer is left no voice" (Am. Br. 6; Hearings, p. 556) was the *alternative* afforded to an employee, for purposes of the former Act, of basing the determination of his "regular occupation" upon either the preceding five-year or fifteen-year period of service (Section 2(a) 4).

munity argument can preclude this Court from reviewing appellees' erroneous interpretation of the Act. Moreover, and even if appellees were correct in their construction of the statute, there were clearly many C(6) firemen as to whose eligibility an examination of the individual circumstances would still have remained indispensable (Br. 27-28; pp. 6-7, *supra;* and in paying benefits to these firemen without first exploring those circumstances, the Board indisputably exceeded its power under the statute.

E. THE C(6) FIREMEN ARE PLAINLY NOT INDISPENSABLE PARTIES TO THIS ACTION.

Appellees' defense of their indispensable party position is clearly only perfunctory. Thus they fail even to mention *Reich v. Webb,* 336 F.2d 153 (9th Cir. 1964) (Br. 59) which alone refutes their contentions, and the cases which they do cite (Appellees' Br. 18-19) are either irrelevant or support appellants' position.*

Appellees suggest that the interests of the C(6) firemen are somehow inadequately represented by the Board and by the Department of Justice (Appellees' Br. 18-19), but they fail to note that those interests are also vigorously advanced by *amicus curiae,* an association consisting of the chief executive officers of numerous railway labor organizations. Compare *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 407-08 (1964).

Appellees also rely upon the District Court's "finding" that the relief sought herein "would adversely affect" the interests of

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*Thus Denver & Rio Grande R.R. Co. v. United States, 124 Fed. 156 (8th Cir. 1903) did not even involve an indispensable party issue. Metropolis Theater Co. v. Barkhausen, 170 F.2d 481 (7th Cir. 1948) involved two concurrent lessees of adjoining property upon which a single building stood and whose interest were, therefore, completely intertwined. Litchfield v. Register and Receiver, 76 U.S. (9 Wall.) 575 (1869) was distinguished away in Work v. Louisiana, 269 U.S. 250, 255-56 (1925) which held that homestead entrymen were *not* indispensable parties to an action to enjoin the implementation of an allegedly illegal order of the Secretary of the Interior, and which, if plaintiff prevailed, would destroy their claims. Montford v. Korte, 100 F.2d 615 (7th Cir. 1939) held that an absent pledgee of stock certificates was *not* indispensable to an action which invalidated the transfer of the certificates from the former owner to the pledgor.

the C(6) firemen (Appellees' Br. 19). Even if it were supported in the record, such a finding obviously would not lead to a conclusion that the C(6) firemen were indispensable parties. *Reich v. Webb, supra;* Br. 57. Moreover, and despite the provisions of Rule 18(3),* appellees point to no evidence in the record to support this finding, and indeed there is none.

The cases cited by *amicus* are no more helpful to them than those relied upon by appellees.† Moreover, the argument which they are called upon to support is only that where absent parties are, *in fact,* indispensable, the court cannot proceed even if they cannot be joined (Am. Br. 9). The argument, however, obviously begs the question, for it ignores the settled rule that in *determining* the issue of indispensability—a decision traditionally based upon practical and equitable considerations—one of the principal factors to be considered is whether the absent parties are beyond the jurisdiction of the court and whether a conclusion of indispensability would therefore deprive the plaintiff of any remedy whatever. See *Bourdieu v. Pacific Western Oil Co.,* 299 U.S. 65, 70-71 (1936).

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*This finding was specified as error by appellants (Specification 6) and the ground of error argued was the lack of evidence to support it (Br. 14). Despite the provisions of Rule 18(3), appellees have provided no record references relied upon to support this finding. See also the finding challenged in Specification 4, upon which appellees apparently also rely (Appellees' Br. 20), and which they have also failed to support in the record.

†State of Washington v. United States, 87 F.2d 421 (9th Cir. 1936) held only that the State of Washington, which claimed ownership of certain lands also claimed by the United States, was an indispensable party to an action to determine title to those lands. Provident Tradesmen's Bank & Trust Co. v. Lumberman's Mutual Casualty Co., 365 F.2d 802 (3d Cir. 1966) held that the insured owner of an automobile was indispensable to an action establishing that the accident driver had been within the scope of permission granted to him by the insured. Though this proposition may not be obvious, it is surely immaterial here. In Stevens v. Loomis, 334 F.2d 775 (1st Cir. 1964), the Court, in holding the absent party *not* indispensable, fromulated the rule as to indispensability in a manner which would quite clearly lead to the same conclusion with respect to the C(6) firemen (334 F.2d at 777).

CONCLUSION

For the reasons stated herein and in appellants' opening brief, the orders and judgment below should be reversed, and appellants should be awarded the relief prayed for in their complaint.

Dated: San Francisco, California, February 20, 1967.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD MURRAY

Nos. 20785 and 21377

In the

United States Court of Appeals

For the Ninth Circuit

THE WESTERN PACIFIC RAILROAD COMPANY and the SOUTHERN PACIFIC COMPANY, suing on their own behalf and on behalf of all other railroads similarly situated,

Appellants,

vs.

HOWARD W. HABERMEYER, THOMAS M. HEALY, and A. E. LYON, individually and as members of the Railroad Retirement Board, et al.,

Appellees.

Appellants' Petition for Rehearing

(With Suggestion for Rehearing en Banc)

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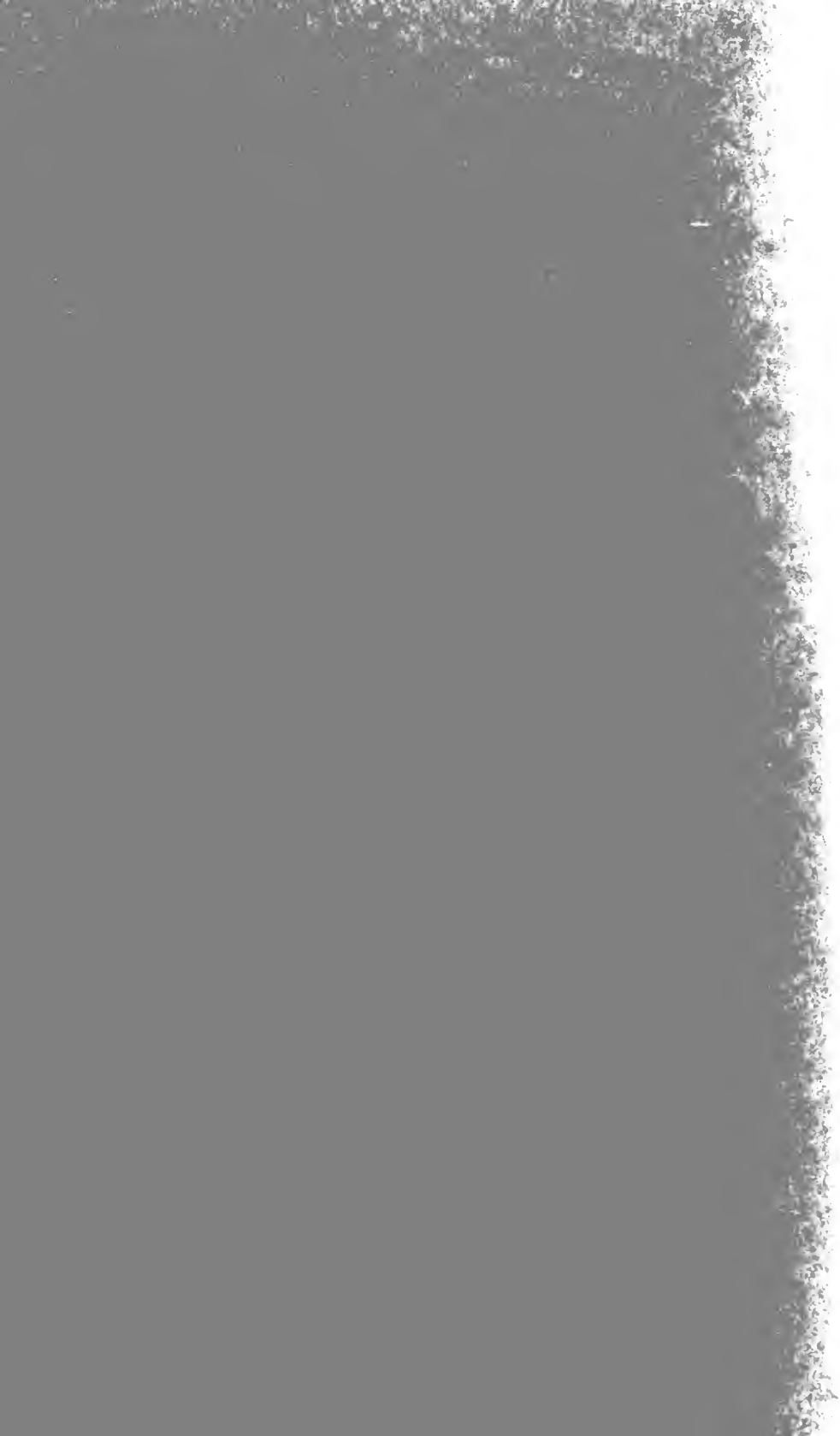

Nos. 20785 and 21377

In the

United States Court of Appeals

For the Ninth Circuit

THE WESTERN PACIFIC RAILROAD COMPANY and the SOUTHERN PACIFIC COMPANY, suing on their own behalf and on behalf of all other railroads similarly situated,

Appellants,

vs.

HOWARD W. HABERMEYER, THOMAS M. HEALY, and A. E. LYON, individually and as members of the Railroad Retirement Board, et al.,

Appellees.

Appellants' Petition for Rehearing

(With Suggestion for Rehearing en Banc)

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Come now the appellants in the above-entitled cases and respectfully request that the Court grant a rehearing therein.

I. The principal, if not the sole, ground upon which the Court has affirmed the judgments below is that, in the view of the Court, Subsection 5(g) of the Act expressly precludes judicial review, *of any sort,* at the instance of the employer, of *any* Board decision granting a claim for unemployment benefits.* (Opinion, pp. 5-10.)

We believe that in arriving at this conclusion, the Court has failed to come to grips with the implicit assumptions upon which its decision necessarily rests: that Congress intended, by Subsection (g), to make the Board the sole and final arbiter of the meaning of the Act and of its own jurisdiction thereunder; and that, consistently with Article III and with Due Process of Law, all judicial review of any sort can be denied with respect to agency action which is contrary to statute and which seriously affects personal or property rights.

These assumptions are alien to our system of justice. They have been disapproved, over the course of a hundred years, by numerous decisions of the Supreme Court of the United States. They were rejected most recently in *Abbott Labs. v. Gardner,* 387 U.S. 136 (1967), and related cases, decisions to which the Court refers (Opinion, pp. 5-6), but which it fails to answer.

II. Accordingly, appellants respectfully request a rehearing upon each of the following grounds:

First. The Court has failed even to consider the Board's flagrant distortion of the meaning of the Disqualifying Conditions of the Act. As appellants have shown (Br. 23-32; R. Br. 5-8), the Board's interpretations of the provisions of Section 4(a-2)—and of the critical words "work" and "good cause"—are wholly at odds both with their meaning and with the manifest purposes of the Act. The Court has not even addressed these

*Except, of course, where the employment relationship is denied.

matters, and apparently regards them as immaterial to its decision.* Yet, if the Court is correct, it necessarily follows that the Board may, whenever it chooses, wholly nullify any provision of the Act by pretending, as in the present case, that it means something other than what it says.

Second. The Court appears to have glossed over the Board's failure to make the mandatory findings and conclusions concerning the applicability of the Disqualifying Conditions. It seems possible that the Court has misconstrued appellants' argument upon this point. Thus, according to the Opinion (pp. 4-5), appellants argue that the Board must make specific, formal findings on a "claim by claim basis," even when blanket findings may properly apply to a large class of applicants, and when the applicants' individual circumstances are wholly immaterial. Having in mind the vast numbers of claims processed by the Board each year, this argument plainly borders upon the absurd. The difficulty is that the argument is not the one which appellants advance; for, as has been said repeatedly in our briefs (*e.g.,* Br. 20-21; R. Br. 2-3), we contend no more than this: that where the circumstances of the individual claimants are, in fact, crucial to eligibility, the Board *must* explore those individual circumstances. As appellants have shown at some length (Br. 20-32; R. Br. 5-8), and indeed, as is substantially admitted by appellees (Appellees' Br. 25-28; see R. Br. 6-7), this was a duty which, in the case of the C(6) firemen, the Board clearly failed to perform. Moreover, the same conclusion would follow even if the Court were prepared to accept appellees' bizarre interpretations of the Disqualifying Conditions themselves (R. Br. 6-7).

The Court suggests, however, that the certification of the claims for payment pursuant to the directions in the Carter memorandum constituted the findings and conclusions required by the statute

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*See, *e.g.,* page 5 of the Opinion, where the Court implies that it is of no consequence that the Board's conclusions may be "incorrect," as well as page 9, where the Court suggests that the Board's "legal conclusion relative to C(6) firemen"—however erroneous—is immunized from review by Subsection (g).

(Opinion, pp. 4-5). Such certifications may indeed have constituted findings and conclusions as to some matters—as, for example, that the claims in question had been filed by C(6) firemen. But they obviously could not have constituted the findings required by Section 4(a-2) upon those matters which the Carter memorandum expressly made immaterial: whether leaving of work was "with good cause"; whether the comparable jobs constituted "suitable work"; and whether such work was rejected "without good cause." It is undisputed that, upon these subjects, no findings were ever made. It necessarily follows that the payment of the benefits was contrary to the procedures established by the statute and therefor in excess of the jurisdiction of the Board.

Third. The Court has improperly assumed that Congress intended to make the Board the sole and final arbiter of the meaning of the Act and of its own powers thereunder. As has been seen, the Court has apparently deemed it immaterial, in determining the effect of Subsection (g), that the Board has ignored the meaning of the statute and the procedures which it prescribes. The Court's decision therefore means that no court, at any place or time, or under any circumstances, may review the actions of the Board—no matter how erroneous they may be, or how flagrantly contrary to the provisions of the Act. As the Supreme Court has said upon numerous occasions, such a notion is wholly foreign to the doctrine of the Separation of Powers and to the nature of the Judicial Process, and raises Constitutional questions of the most serious nature (see, *e.g.,* the cases cited at Br. 54-55).

Is there, in the words of Mr. Justice Harlan, "clear and convincing evidence"* that Congress intended such a result? Or can the language of Subsection (g) be squared with the fundamental principles of our system of justice? We submit that, to the first question, the answer must be "no" and, to the second, a resounding "yes." Thus, when Congress bestowed finality upon the Board's "conclusions of law" it must have had in mind those con-

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**Abbott Labs. v. Gardner,* 387 U.S. 136 (1967) at 140 and note 2.

clusions which resulted from the application of the law (the statute) to the particular facts—and not to the Board's erroneous constructions of the statute itself. And in giving finality to "findings" and to "conclusions," Congress plainly could have intended to bestow its blessings only upon such findings and conclusions as were in fact *made*—and not upon the Board's *failure* to make the findings and conclusions which the statute required.

In short, the statute does not compel the result which the Court has reached, and Article III of the Constitution does not permit it.

Fourth. The Court's denial of any judicial review whatever, at any time or place, clearly deprives appellants of Due Process of Law. This is not a case where judicial review has merely been deferred pending further agency action, or has simply been directed into special channels. It is a case where, if the decision of this Court stands, appellants can have no right of review before any court at any time. Such a right, however, is of the very essence of Due Process. This principle—apparent as it may be—has been declared upon numerous occasions (See, *e.g.,* the authorities cited at Br. 55-56). It was expressed most recently by Mr. Justice Fortas (joined by the Chief Justice and Mr. Justice Clark)* in *Abbott Labs. v. Gardner* and the related cases:

> "[F]undamental principles of our jurisprudence insist that there must be some type of effective judicial review of final, substantive agency action which seriously affects personal or property rights." (387 U.S. at 177)

III. In affirming the decisions below, the Court has necessarily decided these Constitutional questions adversely to appellants—and to the Constitution. Yet, such questions were not considered—or even mentioned—anywhere in the Court's opin-

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*Though Justice Fortas was dissenting, in part, from the decisions of the majority, it is apparent that, upon this point, all Justices found common ground. Justice Fortas' principal objection to the majority decision in *Abbott* was that, given the Constitutional requirement of effective judicial review of all final agency action, the timing and the means (though not the availability) of such review were subject to Congressional control—and that the majority in *Abbott* had failed to ascertain Congress' true intent. 387 U.S. at 177 and note 2; 184 and note 11; 185.

ion. Appellants submit that, before this Court sanctions a major dilution of the Judicial Power and finally obliterates a Constitutional right, it should at least confront directly the nature and implications of its decision.

Appellants respectfully request that the petition for rehearing be granted, and suggest, because of the great significance of the Constitutional questions which must be decided, that the cases be set down for rehearing en banc.

Dated: September 20, 1967

Respectfully submitted,

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CERTIFICATE

I hereby certify that in my judgment this petition for rehearing is well founded. I further certify that it is not interposed for delay.

RICHARD MURRAY